DOCKET

No. 87-1327-ASX Status: GRANTED

Title: Cotton Petroleum Corporation, et al., Appellants
v.
New Mexico, et al.

Docketed: February 5, 1988

Court: Court of Appeals of New Mexico

Counsel for appellant: Israel,Daniel H.

Counsel for appellee: Yohalem,Daniel

NOTE: 1/26/88 notice of appeal filed

Entry	Date	Note	Proceedings and Orders
1	Feb 5 1988	G	Statement as to jurisdiction filed.
2	Mar 7 1988		Motion of appellee New Mexico to dismiss filed.
4	Mar 7 1988	X	Brief amicus curiae of Jicarilla Apache Tribe filed.
5	Mar 7 1988	X	Brief amicus curiae of Council of Energy Resource Tribes filed.
3	Mar 9 1988		DISTRIBUTED. March 25, 1988
6	Mar 16 1988	X	Reply brief of appellants Cotton Petroleum Corp., et al. filed.
8	Mar 28 1988		REDISTRIBUTED. April 1, 1988
10	Apr 5 1988		REDISTRIBUTED. April 15, 1988
11	Apr 18 1988		PROBABLE JURISDICTION NOTED. The parties are invited also to brief and argue the following question: "Does the Commerce Clause require that an Indian Tribe be treated as a state for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe?"
			***
12	May 17 1988		Record filed.
		*	Certified copy of original record, 5 volumes, received.
14	May 19 1988		Order extending time to file brief of appellant on the merits until June 23, 1988.
15	Jun 21 1988		Order further extending time to file brief of appellant on the merits until June 30, 1988.
16	Jun 24 1988		Brief amicus curiae of Southern Ute Indian Tribe filed.
18	Jun 29 1988		Brief amicus curiae of Texaco, Inc. filed.
19	Jun 29 1988		Brief amicus curiae of Navajo Tribe of Indians filed.
17	Jun 30 1988		Brief amicus curiae of Crow Tribe, et al. filed.
20	Jun 30 1988		Brief amicus curiae of Assiniboine and Sioux Tribes of Fort Peck Reservation filed.
21	Jun 30 1988		Joint appendix filed.
22	Jun 30 1988		Brief amicus curiae of New Mexico Oil & Gas Association filed.
23	Jun 30 1988		Brief amici curiae of Blackfeet Tribe of Indians, et al. filed.
24	Jun 30 1988		Brief amici curiae of Council of Energy Resource Tribes, et al. filed.
25	Jun 30 1988	G	Motion of Jicarilla Apache Tribe for leave to file a brief as amicus curiae filed.
26	Jun 30 1988		Brief of appellants Cotton Petroleum Corp., et al. filed.
28	Jul 15 1988		Order extending time to file brief of appellee on the

No. 87-1327-ASX

Entry	Date	Note	Proceedings and Orders
			merits until September 2, 1988.
29	Aug 31 1988		Brief of appellee New Mexico filed.
30	Sep 1 1988		Brief amici curiae of San Juan County, et al. filed.
31	Sep 2 1988		Brief amici curiae of Arizona, et al. filed.
32	Sep 15 1988		Motion of Jicarilla Apache Tribe for leave to file a brief as amicus curiae GRANTED.
33	Sep 28 1988		CIRCULATED.
34	Sep 30 1988		Set for argument. Wednesday, November 30, 1988. (2nd case) (1 hr.)
35	Sep 30 1988	X	Reply brief of appellants Cotton Pet. Corp., et al. filed.
36	Nov 22 1988	X	Supplemental brief of appellants Cotton Petroleum Corp., et al. filed.
37	Nov 30 1988		ARGUED.

JURISDICTIONAL STATEMENT

87-1327

No. ....

In The

Supreme Court of the United States

October Term, 1987

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COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*,
Appellees.

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ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

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JURISDICTIONAL STATEMENT

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Daniel H. Israel, Esq.
1100 Stout St., #850
Denver, CO 80204
Tel. [303] 629-1100

G. Samuel Schaunaman, II, Esq.
Cities Service Oil and Gas Corporation
P. O. Box 300
Tulsa, Oklahoma 74102
Tel. [918] 561-4278

Sarah E. Bennett, Esq.
Rothstein, Bailey, Bennett, Daly & Donatelli
500 Montezuma
Suite F
Santa Fe, NM 87504-8180
Tel. [505] 988-8004

Counsel for Appellants

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Does the Commerce Clause require apportionment or allocation of New Mexico's five oil and gas taxes imposed on a Jicarilla Indian Reservation oil and gas lessee who is also subject to two Jicarilla Apache Tribe oil and gas taxes, when New Mexico provides only a small fraction of the Reservation's essential government services and when the combined effect of the state and tribal taxes is to increase by 75% the on-Reservation tax burden?

2. Do the federal laws and policies protecting Jicarilla tribal self-government and promoting Jicarilla Indian Reservation economic development preempt New Mexico's oil and gas taxes levied on an oil and gas lessee of the Jicarilla Apache Tribe?

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ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

JURISDICTIONAL STATEMENT

Appellants, Cotton Petroleum Corporation ("Cotton") and its sister corporation, United Crude Company appeal from the judgment and opinion of the Court of Appeals of New Mexico entered in this proceeding on September 17, 1987.[1] On September 24, 1987, the Court of Ap-

[1] *See* Appendix 32 for a complete listing of all publicly held parent companies, subsidiaries (except wholly owned subsidiaries), and affiliated companies of Cotton Petroleum Corporation.

All parties to this proceeding were listed in the District Court caption: *Cotton Petroleum Corporation and United Crude Company v. State of New Mexico; Oil and Gas Accounting Commission of the State of New Mexico; and Antonio Martinez, Executive Director, New Mexico Oil and Gas Accounting Commission.*

peals denied Cotton's Motion for Rehearing. On November 3, 1987, the New Mexico Supreme Court issued a writ of certiorari to hear the Cotton appeal. On November 10, 1987 the New Mexico Supreme Court quashed the issuance of the writ.

OPINIONS BELOW

The opinion of the panel of the State of New Mexico Court of Appeals is reported at 745 P.2d 1170 (1987). The opinion of the District Court for Santa Fe County is unreported. Both opinions are reproduced in the appendix to this statement.

JURISDICTION

(i) The proceeding below is a civil action challenging New Mexico oil and gas production and severance taxes imposed pursuant to N.M. Stat. Ann. §§ 7-29-1 to-22 (1978); §§ 7-30-1 to -26 (1978); §§ 7-31-1 to -25 (1978); §§ 7-32-1 to-27 (1978); and §§ 7-34-1 to-20 (1978).

(ii) The decision of the panel of the New Mexico Court of Appeals was entered on September 17, 1987. The Court of Appeals denied a timely request for rehearing on September 24, 1987. On November 10, 1987 the New Mexico Supreme Court quashed an earlier issuance of a writ of certiorari. Appellants' notice of appeal to this Court was filed on January 26, 1988 in the New Mexico Court of Appeals.

(iii) Appellant believes this court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1257(2).

(iv) The following cases sustain jurisdiction:

Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980); *United States v. John*, 437 U.S. 634 (1978); and *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965). *See also Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 56 U.S.L.W. 3450 (Jan. 12, 1988) (No. 87-343); *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987) (permitting an appeal under 28 U.S.C. § 1254(2)).

CONSTITUTIONAL PROVISIONS AND STATUTES

The validity of N.M. Stat. Ann. §§ 7-29-1 *et seq.*, §§ 7-30-1 *et seq.*, §§ 7-31-1 *et seq.*, §§ 7-32-1 *et seq.*, and §§ 7-34-1 *et seq.* as applied is involved. These sections are set out in relevant part in the appendix.

The federal laws at issue include the Executive Order of February 11, 1887 which established the Jicarilla Indian Reservation, 1 C. Kappler, Indian Affairs, Laws and Treaties, 875 (1904); the Indian Mineral Leasing Act, 25 U.S.C. 396a; the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*; and the Indian Finance Act, 25 U.S.C. § 1451 *et seq.* These federal laws are also set out in relevant part in the appendix.

The constitutional provisions at issue in this case are the United States Commerce Clause and the Supremacy Clause.

STATEMENT OF THE CASE

Cotton Petroleum Corporation and its sister corporation, United Crude Company, produce and market oil and gas on approximately 15,000 acres of leased tribal trust land located on the Jicarilla Apache Indian Reservation, established by the Executive Order of February 11, 1887. The Cotton leases were issued by the Jicarilla Apache Tribe under the authority of 25 U.S.C. § 396a and are administered by the Secretary of the Interior (Secretary) and the Jicarilla Apache Tribe (Tribe) pursuant to that federal statute, 25 C.F.R. Part 211 (1987), 43 C.F.R. § 3160 (1987), and relevant tribal ordinances.

Cotton acquired its Jicarilla tribal oil and gas leases in 1976 and in the years since has drilled 50 wells which now function side by side with 15 wells that were operating on the leased premises at the time of the acquisition by Cotton of the Jicarilla tribal leases. Pursuant to the leases, Cotton pays a royalty to the Tribe of 12-½%, rent of $125.00 per acre, and an overriding royalty to its lease assignors of 12-½%. In addition, Cotton pays two substantial oil and gas production taxes to the Tribe.[2] The tribal taxes are imposed pursuant to tribal governmental

[2] The first tax is an oil and gas severance tax and the second is an oil and gas privilege tax.

authority confirmed in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

Cotton also pays five unapportioned oil and gas related production taxes to New Mexico.[3] Because it pays overlapping tribal and state taxes, Cotton's total oil and gas production tax burden is approximately 14% of value, whereas off the Jicarilla Indian Reservation, producers pay production taxes of approximately 8% of value. Believing that it should not be required to pay oil and gas taxes which are 75% higher than those paid by off-Reservation producers, Cotton filed court actions seeking tax relief.

Cotton's civil actions are limited to seeking a return of two of the five New Mexico taxes, namely the severance tax and the emergency school tax. Cotton also seeks a declaration that these two New Mexico oil and gas taxes are unlawful as imposed on it as a Jicarilla Reservation taxpayer, and an order enjoining the imposition of these two taxes.

In asserting its right in the New Mexico courts to be free of excessive New Mexico taxation, Cotton relies in part upon *Merrion v. Jicarilla Apache Tribe:*

> [W]hen the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue

[3] The five taxes are the New Mexico Oil and Gas Severance Tax, N.M. Stat. Ann. §§ 7-29-1 to -22 (1978); the New Mexico Oil and Gas Conservation Tax, N.M. Stat. Ann. §§ 7-30-1 to -26 (1978); the New Mexico Oil and Gas Emergency School Tax, N.M. Stat. Ann. §§ 7-31-1 to -25 (1978); the New Mexico Oil and Gas Ad Valorem Production Tax, N.M. Stat. Ann. §§ 7-32-1 to -27 (1978); and the New Mexico Oil and Gas Production Equipment Ad Valorem Tax, N.M. Stat. Ann. §§ 7-34-1 to -20 (1978).

> would arise only if a State attempted to levy a tax on the same activity, which is more than the State's contact with the activity would *justify*. In such a circumstance, any challenge asserting that tribal and state taxes create a *multiple burden* on interstate commerce should be directed at the state tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause.

455 U.S. at 158 n.26 (emphasis added).

The record on appeal demonstrates a wide disparity between the cost of state and local services to the Reservation and the state revenues generated from Reservation oil and gas activities.

Table 1

Cost of New Mexico and Local Services to the Cotton oil and gas operations 1981-1985	$ 89,384
Oil and Gas Tax Revenues Received by New Mexico From the Cotton Reservation Operations 1981-1985	$ 2,293,953

Table 2

Cost of New Mexico and Local Services to the Jicarilla Reservation As a Whole 1981-1985	$10,704,748
Oil and Gas Tax Revenues Received By New Mexico from the Reservation As a Whole 1981-1985	$47,483,306

See Cotton's Trial Exhibit 13, pp. 1, 3, 4, 10 (as revised) and Opinion of the Court of Appeals, (App. 6).[4]

The Chairman of the Jicarilla Apache Tribe testified on behalf of Cotton at the trial and the Tribe filed briefs amicus curiae in support of Cotton before the District Court and the Court of Appeals. The District Court entered a memorandum order and judgment on March 10, 1986 and a final amended order and judgment on March 28, 1986. On September 17, 1987 a panel of the New Mexico Court of Appeals issued an opinion affirming the decision of the Santa Fe District Court, concluding that *Commonwealth Edison Co. v. State of Montana*, 453 U.S. 609 (1981) (upholding Montana's right as the principal provider of a civilized society to impose unapportioned severance taxes on Montana coal) conclusively affirmed New Mexico's right to impose without apportionment its five taxes on Jicarilla Reservation oil and gas production. (App. 8). The Court of Appeals also concluded that New Mexico's taxes had not been preempted by federal laws and

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[4] Perhaps the most dramatic example of the imbalance between State revenues and services on the Jicarilla Reservation involves the New Mexico oil and gas severance tax funds generated from the Reservation. Thus, while during the years 1981-85 New Mexico collected $19,187,334 in oil and gas severance tax revenues from the Reservation, New Mexico could only identify as oil and gas severance tax financed capital projects benefitting the Reservation a 1979 allocation to repair Highway 44 passing through the Reservation and a $3,394 senior center allocation to be made beginning in 1985. State Exhibit N, Table 1. No state severance tax monies have been allocated to build schools, water and sewer projects, hospitals, or state higher educational facilities on the Jicarilla Reservation although state severance tax monies are frequently used to support such facilities located off the Reservation. Trial Transcript 241-242, 280-281.

policies designed to strengthen tribal self-government and improve the oil and gas based economy of the Jicarilla Indian Reservation (App. 11-12).

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THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND IMPORTANT

A. Multiple Taxation on the Indian Reservations Penalizes Tribal Business Partners and Suppresses Reservation Mineral Production.

This case presents the Court with the opportunity to resolve what is fast becoming a serious and widespread problem on western Indian Reservations.[5] As the Court has repeatedly recognized, excessive and unjustified state

[5] Over 150 Indian Reservation state tax protest cases similar to the present case have been filed in Arizona, New Mexico, Montana and Utah. *See, e.g., Union Oil Co. of California v. Department of Revenue of the State of Montana; State Treasurer of the State of Montana; and the Board of Oil and Gas Conservation of the Department of Natural Resources and Conservation of the State of Montana*, No. 43353 (Lewis and Clark County Dist. Ct.); *Granite Construction Co. v. Arizona Department of Revenue*, No. CV 87-13094 (Arizona Superior Ct., Maricopa County); *Peabody Coal Co. v. State of Arizona*, No. 1 CA-CIV 9317 (Ariz. Ct. App.); *Kerr-McGee Corp. v. Apache County*, No. 6553 (Ariz. Superior Ct.); *Pittsburg & Midway Coal Mining Co. v. Saunders, et al.*, No. CIV 86-1442 M (D.N.M.); *Pittsburg & Midway Coal Mining Co. and the Connecticut Bank and Trust Co., N.A. v. Dell Curto, et al.*, No. SF 86-11(C) (First Judicial Dist., County of Santa Fe); *Quivira Mining Co. formerly Kerr-McGee Corp. v. Revenue Department of the State of New Mexico, et al.*, No. SF 79-2364(c) (First Judicial Dist., County of Santa Fe); *Quivira Mining Co. formerly Kerr-McGee Corp. v. New Mexico Taxation and Revenue Division*, No. SF 82-392(C) (First Judicial Dist., County of Santa Fe); *Texaco, Inc., et al. v. San Juan County*, Nos. 4152-4153 et al. (San Juan County, Utah Dist. Ct.)

taxes and fees operate to deprive Indian Reservations of badly needed income and employment. *See, e.g., Mescalero Apache Tribe v. New Mexico*, 462 U.S. 324, 341 (1983). Moreover, as this case demonstrates, New Mexico's overlapping taxes unfairly penalize Reservation lessees and discourage new mineral exploration.

This case invites the Court to apportion or allocate under the Commerce Clause New Mexico taxes in order to prevent multiple taxation of a Reservation oil and gas lessee already subject to two Jicarilla tribal taxes. Because the lawfulness of New Mexico's five taxes imposed without apportionment or allocation on the severance of Jicarilla Reservation oil and gas must be determined against the backdrop of two Jicarilla tribal taxes imposed on the same mineral development,[6] the right of western states to tax mineral severance without apportionment upheld in *Commonwealth Edison* is not applicable. In *Commonwealth Edison* all parties agreed that because only Montana could impose a tax on the severing of coal off the Reservation in Montana, the first and second Commerce Clause "nexus" and "apportionment" tests were not applicable, and the focus of this Court's review was on whether the Montana severance tax discriminated against interstate commerce. *Commonwealth Edison Co. v. State of Montana*, 453 U.S. at 617. In our view, the decision below incorrectly and mechanically applied *Commonwealth Edison's* single taxing entity precedent to an event of

[6] The power of the Jicarilla Apache Tribe to impose oil and gas production taxes to support tribal government services as the principal provider of a civilized society on the Jicarilla Indian Reservation was upheld by this Court in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137.

multiple taxation.[7] Hence, the lower court ruling is in conflict with this Court's Commerce Clause teachings, penalizes Cotton for doing business on the Jicarilla Apache Reservation, and should be reversed.

B. This Court's Commerce Clause Teachings Are Turned Upside Down By The New Mexico Decision.

This Court has on numerous occasions suppressed multiple tax burdens unfairly imposed on interstate taxpayers. In some cases Commerce Clause protections operate to apportion the aggregate tax burden among several states, and in other situations Commerce Clause and Fourteenth Amendment Due Process protections allocate the taxing power away from states who do not provide the interstate taxpayer with the requisite government protection and services. For example, recently the Court confirmed that there must exist "a rational relationship between the income attributed to the State and the intrastate values of the enterprise. . . . The tax cannot be out of all appropriate proportion to the business transacted by the appellant in that State." *Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207, 219-220 (1980). *See also Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 164-170 (1983). The need to carefully apportion income subject to state taxation recognized in *Exxon* and *Container Corp.* assures that taxpayers in interstate commerce are subject to a fair and not a burdensome tax load. In *Hans Rees' Sons v. North Carolina*, 283 U.S. 123, 134

[7] Indeed, in *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 56 U.S.L.W. 3450 (Jan. 12, 1988) (No. 87-343) the Court of Appeals for the Ninth Circuit rejected the very proposition adopted by the decision below—namely that *Commonwealth Edison* automatically operates to permit unapportioned state taxation of Indian mineral reserves held in trust by the United States, 819 F.2d at 901 (citing *Crow Tribe v. Montana*, 665 F.2d 1390, 1391 (9th Cir. 1982)).

(1931) the Court concluded in the context of income taxation of interstate commerce:

> When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method, which, albeit fair on its face operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction.[8]

Application of these principles to the Cotton tribal lease operations suggests that the five New Mexico taxes must be apportioned or allocated. Cotton's evidence shows that significant federal and tribal government activities on the Jicarilla Indian Reservation provide 90% of the services and infrastructure used by the Indians and their non-Indian commercial partners. And yet New Mexico refuses to make any reduction in its tax burden.[9] To the contrary, New Mexico misapplies the Court's off-Reservation holding in *Commonwealth Edison* and attempts to use it as a

[8] A practical effect inquiry in *Hans Rees' Sons, supra*, demonstrated that while the taxpayer's income having its source within the taxing state was 17%, North Carolina allocated approximately 80% of the taxpayer's income to itself. As a result, the Court concluded that the tax burden was "out of all appropriate proportion to the business transacted by the appellant in that State. In this view, the taxes as laid were beyond the State's authority." *Hans Rees' Sons v. North Carolina*, 283 U.S. at 135-136.

[9] On the Jicarilla Reservation, New Mexico is not the principal provider of a civilized society and therefore under the Commerce Clause, the State should reduce its normal tax burden. For example, during the years 1981-1985 the federal and tribal governments expended $76,943,947 for Reservation services, and New Mexico and its subdivisions expended during the same time frame $10,704,748. Cotton Ex. 13, p. 10. One reason New Mexico's level of government services is so low

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shield to protect what we believe is unjustified Reservation taxation.[10]

The Court has recognized that when more than one state enjoys a taxing nexus with a commercial activity, each of the taxing states must apportion its taxes so as to eliminate an impermissible multiple burden. For instance, because the Washington Business and Occupation tax was "levied solely on the value of the loading and unloading that occurred in Washington", it was properly apportioned under the Commerce Clause. *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978). Similarly in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) a Mississippi sales tax was upheld as it applied to the income of an interstate transporter of motor vehicles utilizing Mississippi highways, because the tax was apportioned to only income derived from Mississippi operations. *Id.* at 276 n.2. These teachings have been completely ignored by the New Mexico courts.

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on the Jicarilla Indian Reservation is because Art. IV, Sec. 31 of the New Mexico Constitution prohibits state aid to any community "not under the absolute control of the state."

10 In *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952) the Court struck down as unjustified Ohio's unapportioned property taxes imposed on Ohio River vessels which stopped in Ohio only for occasional fuel or repairs, observing:

> The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. . . . Otherwise there would be multiple taxation of interstate operations and the tax *would have no relation to the opportunities, benefits, or protection on which the taxing state gives those operations.*

Id. at 384-385 (emphasis added).

On other occasions, the Court has relied both on the Commerce Clause and the Due Process Clause of the Fourteenth Amendment to allocate taxing power between states so as to protect interstate commerce from taxation which bears no relationship to the services or benefits provided. In *National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967) the Court refused to allow Illinois to impose its use taxes upon an out-of-state seller of goods whose only connection with Illinois customers was its use of common carrier or the United States mail. The interstate taxpayer in *National Bellas Hess, Inc.*, was protected from Illinois taxation because that state demonstrated "no legitimate claim to impose 'a fair share of the cost of the local government' on [National Bellas Hess]". *Id.* at 759-760.

Constitutional principles of allocation have also been used to sustain unapportioned taxation where the activity taxed occurs solely within the taxing state. Thus in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Court upheld New Mexico's unapportioned gross receipts tax laid on the privilege of selling magazine advertising for a magazine having interstate circulation:

> The tax is not one which in form or substance can be repeated by other states . . . [R]eceipts from subscriptions are not included in the measurement of the tax. It is not measured by the extent of the circulation of the magazine interstate. All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere.

Id. at 260. A comparable conclusion was reached in *Commonwealth Edison* where the Court affirmed that the coal

mining subject to Montana's severance tax can occur in no other state, and hence apportionment is not required. 453 U.S. at 617.[11]

These cases and others confirm that under the Commerce Clause, interstate commerce may be taxed in order to carry a fair share of the cost of government whose protection it enjoys and may be taxed under the Due Process Clause where a state has given something for which it may ask taxes in return. These apportionment and allocation concepts have been developed by the Court to protect the integrity of interstate commerce and to assure that the level of state taxation in every case is fully "justified". *Freeman v. Hewit*, 329 U.S. 249, 253 (1946). Cotton's evidence of "unjustified" New Mexico taxation was ignored by the lower courts. Cotton now seeks the assistance of this Court to assure it and the Jicarilla Apache Tribe that Jicarilla Reservation oil and gas lessees are fully protected under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment.

C. New Mexico's Taxes Are Preempted By The Federal Laws and Policies Which Protect Tribal Self-Government And Strengthen Impoverished Reservation Economies.

The Court has previously held that the leasing of Reservation oil and gas resources pursuant to the Indian

[11] A similar allocation approach was adopted by the Court in *CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987). In *CTS Corp.* the Court upheld Indiana's restrictions on tender offers in the face of Commerce Clause objections, finding that Indiana has a substantial interest in protecting nonresident shareholders of Indiana corporations, particularly when the Indiana regulatory scheme at issue applied only to Indiana corporations that have a substantial number of Indiana shareholders. *Id.* at 1651-1652.

Mineral Leasing Act, 25 U.S.C. § 396a is designed to maximize the revenues for the Tribes and to provide the Tribes with uniformity of regulation and control of their most valuable resource. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985).[12] Moreover, the Court has recently held that Congress' enactment of the Indian Self-Determination and Education Assistance Act and the Indian Finance Act, 25 U.S.C. §§ 450 *et seq.* and 1451 *et seq.* (supplementing federal authority previously secured the tribes in the federal acts establishing the reservations and in the Indian Reorganization Act, 25 U.S.C. § 476 *et seq.*) is designed to permit the Indian Reservations to develop economies which are "comparable" to neighboring non-Indian economies. *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083, 1092 n.19 (1987).[13] Further, this

[12] Pursuant to 25 U.S.C. § 396a Cotton's operations are subject to comprehensive federal regulations found at 25 C.F.R. Part 211 (1987) and 43 C.F.R. § 3160 (1987). This Court has found the presence of comparable sweeping federal regulations relating to Reservation timber harvesting to preclude state taxation of that regulated Reservation activity. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 (1980).

[13] As noted above, the federal purpose for developing the Jicarilla oil and gas reserves is to assure that the "Indians receive the greatest return from their property". *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 767 n.5. Yet New Mexico concedes that for every dollar of taxes paid by Cotton to New Mexico a dollar is lost which could otherwise be available to assure the Jicarilla Tribe the "greatest return" from its oil and gas reserves. Tr. 246, 402. Further, Reservation and off-Reservation economic "comparability" are condemned by New Mexico's taxes, for even New Mexico concedes that when given the choice an operator would choose not to undertake oil and gas exploration on the Reservation, but would rather select exploration off the Reservation where the tax level is significantly lower because it is not subject to multiple taxation. Tr.

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Court has recognized the important federal policy of encouraging tribal taxation in order to finance necessary tribal governmental services—in recognition of the emerging role of Tribes as government providers of a civilized society on the reservations.[14] *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985); *Merrion v. Jicarilla Apache Tribe, supra*. In *Merrion* the court stated:

> The petitioners [oil and gas producers] avail themselves of the 'substantial privilege of carrying on business' on the reservation. . . . They benefit from the provision of police protection and other governmental services, as well as from 'the advantages of a civilized society' that are assured by the existence of tribal government. . . . Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government.

Id. at 137, 138 (citations omitted).

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500-502. The overlapping New Mexico taxes have contributed to Cotton's decision not to drill new Reservation wells, aside from low risk infield wells located adjacent to its existing producing wells. Tr. 67-68. These findings are consistent with the Court's holding in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983), that New Mexico's taxation of Reservation hunting and fishing deprives the Tribe of additional revenues and additional opportunities for tribal employment.

[14] During the years 1981-85, Cotton paid New Mexico $2,293,953 in taxes, and the Jicarilla Apache Tribe $793,909 in taxes. Cotton Exhibit 13, pp. 1-2. Thus, while the Tribe and the United States carry 90% of the governing responsibility for the Jicarilla Indian Reservation, (see fn. 9 *infra*), New Mexico nevertheless takes in taxes three dollars from Reservation oil and gas production for every one dollar in taxes received by the Tribe.

The presence of these preemptive federal policies necessarily reduces the power of the states to impose taxes on the reservation.

> [*I*]*n the special area of state taxation*, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation. . . .

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (emphasis added).[15] Indeed, because the primary authority and responsibility for administering the Reservation lies with the federal government and the tribes, the states are left "with no duties or responsibilities" and have a reduced power to influence reservation affairs. *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S.

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[15] New Mexico seeks to impose its taxes on the extraction of minerals that are unquestionably the property of the Tribe and are held in trust by the United States for the benefit of the Tribe in the same manner as all other trust property. In *Commonwealth Edison Co. v. State of Montana*, 453 U.S. at 624 the Court observed when examining the impact of the Montana coal severance tax that: "[i]n many respects, a severance tax is like a real property tax . . . ." There can be little doubt that New Mexico is prohibited from imposing a real property tax on trust lands, and the Disclaimer Clause and the Enabling Act by which New Mexico was admitted to the union clearly bars such a tax. Act of June 20, 1910, Ch. 310 § 2, 6 to 12, 18, 36 Stat. 557. These circumstances alone suggest that application of New Mexico's taxes to the oil and gas reserves of the Jicarilla Tribe raises a great potential for interference with important economic and other interests of the Tribe.

685, 691 (1965).[16] Given the reduced responsibilities of the states, the Court no longer permits states to tax a Reservation based, federally regulated activity involving important Indian property interests where the only state interest demonstrated is a general desire to raise revenues. *See Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (no state interest to justify New Mexico's gross receipts tax on construction by a non-Indian of a Reservation school); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (no state interest to justify Arizona's taxation of Reservation timber trucks owned by non-Indians); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (no state interest to permit New Mexico to regulate Reservation hunting by non-Indians); and *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 56 U.S.L.W. 3450 (Jan. 12, 1988) (No. 87-343) (no state interest to permit Montana to impose its severance and gross proceeds taxes to *off*-Reservation mining of Crow tribal coal undertaken by a non-Indian lessee of the Tribe).[17]

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[16] In *California v. Cabazon Band of Mission Indians*, 107 S. Ct. at 1091 n. 17, the Court concluded that the state interest in Reservation taxation is "correspondingly weak" and in *Crow Tribe of Indians v. State of Montana*, the Court of Appeals for the Ninth Circuit concluded that Indian trust minerals are "not the state's to regulate . . . . it has no . . . legitimate interest in appropriating Indian mineral wealth." *Id.* at 902 (citing *Crow Tribe v. Montana*, 650 F.2d 1104, 1114 (9th Cir. 1981)).

[17] While Cotton in the proceeding below placed its primary emphasis on the Commerce Clause, it also contended that the federal statutory and regulatory scheme which controls and regulates the Jicarilla Indian Reservation's most valuable resource —its oil and gas reserves held in trust by the United States—was

(Continued on following page)

Indeed, state taxation or regulation has only been permitted in two unusual situations where the activities taxed (*i.e.*, the retail sale of cigarettes and the retail sale of alcohol) were found not to be the subject of extensive federal and tribal regulation. Rather, cigarette and liquor sales were seen as commercial events historically regulated and administered by the states and having no protected Reservation connection. *Washington v. Confederated Tribes of*

(Continued from previous page)

so pervasive that New Mexico's overlapping taxes are preempted. In making this claim, Cotton relied on the Court's holding in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 147-148 (1980), where the Court found that timber regulations of the Secretary of the Interior similar to the oil and gas regulations found in 25 C.F.R. Part 211 (1987) and 43 C.F.R. 3160 (1987) cause the Secretary to exercise "literally daily supervision" over timber operations in a "federal regulatory scheme . . . so pervasive as to preclude the additional [state] burdens sought to be imposed . . . ." Cotton's mineral tax preemption claim differs, if at all, from the preemption claim recently affirmed by the Court in *Crow Tribe of Indians v. State of Montana, supra*, only as to the degree of state tax interference with Reservation economic interests. Thus, while the Montana coal taxes at issue in *Crow Tribe v. Montana* were found to have virtually halted new Crow Reservation coal production, Cotton showed that the New Mexico oil and gas taxes, like the Montana taxes at issue in *Crow Tribe of Indians v. State of Montana*, increase the cost of production, reduce the money available to pay royalty to the Tribe, and suppress, but do not halt, new oil and gas production. *See* fn. 13 *infra*. But, as this Court noted in *California v. Cabazon Band of Mission Indians*, 107 S. Ct. at 1092 and the Court of Appeals for the Ninth Circuit held in *Crow Tribe of Indians v. State of Montana*, 819 F.2d at 900, federal preemption may occur even in the absence of documentation of a permanent injury to a Reservation market: "As long as the taxes interfere[] or [are] incompatible with federal and tribal interests reflected in federal law, they are *deemed preempted* unless the state interests at stake are sufficient to satisfy the assertion of state authority." (emphasis added).

the Colville Indian Reservation, 447 U.S. 134 (1980) and *Rice v. Rehner*, 463 U.S. 713 (1983).

Notwithstanding the Court's preemption teachings and New Mexico's documented lack of governmental responsibility for Jicarilla Reservation oil and gas production, the lower courts declined to enter a judgment preempting the New Mexico taxes. Given the overriding federal and tribal commitment to improve the oil and gas based economy of the Jicarilla Apache Reservation, the Court should reverse the decision below and rule that two of New Mexico's five oil and gas taxes are preempted.[18]

[18] In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), California was prevented from imposing property taxes on containers placed in foreign commerce even on an apportioned basis, because the containers were subject (as Cotton's activities are subject to a 100% level of tribal taxation) to a 100% level of Japanese taxation, and any state taxation would conflict with federal uniformity required in foreign commerce and as well would create an enhanced risk of multiple taxation. *Id.* at 447-449. While the need for federal uniformity in dealing with foreign commerce is of course not the equivalent of the uniform federal policies promoting Indian Reservation oil and gas development, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 767 n.5, the Court has been careful to protect federal interests in both areas from overzealous state taxation.

CONCLUSION

For these reasons, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, or summary reversal.

Dated February, 1988.

Respectfully submitted,

DANIEL H. ISRAEL, ESQ.
1100 Stout St., #850
Denver, CO 80204
Tel. [303] 629-1100

G. SAMUEL SCHAUNAMAN, II, ESQ.
Cities Service Oil and Gas Corporation
P. O. Box 300
Tulsa, Oklahoma 74102
Tel. [918] 561-4278

SARAH E. BENNETT, ESQ.
ROTHSTEIN, BAILEY, BENNETT, DALY & DONATELLI
500 Montezuma
Suite F
Santa Fe, NM 87504-8180
Tel. [505] 988-8004

Counsel for Appellants

APPENDIX

APPENDIX

A. Judgment, Opinion and Orders of the New Mexico Court of Appeals, Whose Judgment Is Sought To Be Reviewed.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 9268

COTTON PETROLEUM, et al.,

Plaintiffs-Appellants,

v.

STATE OF NEW MEXICO, et al.,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY

BRUCE E. KAUFMAN, District Judge

(Filed September 17, 1987)

Daniel H. Israel and Jane E. Lein
Cogswell and Wehrle
Denver, Colorado

G. Samuel Schaunaman, II, General Attorney
Cities Service Oil & Gas Corp.
Tulsa, Oklahoma

Caroline B. Benediktson
Cotton Petroleum Corp.
Tulsa, Oklahoma

Sarah E. Bennett
Rothstein, Bailey, Bennett, Daly & Donatelli
Santa Fe, New Mexico

Attorneys for Plaintiffs-Appellants

Hal Stratton, Attorney General
Paula Forney-Thompson, Frank D. Katz,
Carolyn Wolf and Daniel Yohalem
Special Assistants Attorneys General
Taxation and Revenue Department
Santa Fe, New Mexico

Attorneys for Defendants-Appellees

B. Reid Haltom
Nordhaus, Haltom, Taylor & Taradash
Albuquerque, New Mexico
Attorneys for the Jicarilla Apache Tribe, Amicus Curiae

OPINION

BIVINS, Judge.

This appeal presents the question of whether certain oil and gas taxes imposed by the state against a non-Indian producer whose operations are located on an Indian Reservation constitute an impermissible burden on interstate commerce. We hold they do not and affirm the district court.

Cotton Petroleum and its sister corporation, United Crude Company (Cotton), produce and market oil and gas on approximately 15,000 acres of tribal trust land located on the Jicarilla Indian Reservation (Reservation) under five oil and gas leases issued by the Jicarilla Apache Tribe (Tribe). Cotton pays a royalty to the Tribe of 12½% plus rent of $125 per acre, and an overriding royalty of an additional 12½% to the assigners of the leases. In addition, Cotton pays to the Tribe two oil and gas related taxes that equal approximately 6% of its production.

Cotton also pays to the state five oil and gas production taxes equal to approximately 8% of its production.[1]

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[1] The five taxes are New Mexico Oil and Gas Severance Tax, NMSA 1978, Sections 7-29-1 to -22 (Rep.Pamp.1983); the New Mexico Oil and Gas Conservation Tax, NMSA 1978, Sections 7-30-1 to -26 (Rep.Pamp.1983); the New Mexico Oil and Gas Emergency School Tax NMSA 1978, Sections 7-31-1 to -25 (Repl. Pamp.1983); the New Mexico Oil and Gas Ad Valorem Production Tax, NMSA 1978, Sections 7-32-1 to -27 (Repl.Pamp.1983); and the New Mexico Oil and Gas Production Equipment Ad Valorem Tax, NMSA 1978, Sections 7-34-1 to -20 (Repl.Pamp. 1983).

It challenges only the two most substantial taxes: the severance tax, Sections 7-29-1 to -22; and the oil and gas emergency school tax, Sections 7-31-1 to -25. Because of the overlapping tribal and state taxes, Cotton's overall oil and gas tax burden is approximately 14% of value compared to off-the-Reservation producers who pay only 8% of value in production taxes. Contending it should not have to pay both tribal and state oil and gas taxes, Cotton sought relief.

Cotton brought two actions in district court. The first sought a refund of taxes paid under protest. *See* §§ 7-29-12 and 7-31-15 (since repealed, but in effect at the time suit was filed). In addition to seeking a refund, Cotton also asked for declaratory and injunctive relief. The second, a mandamus action, sought refund for taxes "erroneously paid" from March 1981 to April 1982, a time when no protests were filed. *See* §§ 7-29-11 and 7-31-14. These actions were consolidated and the district court granted the Tribe's motion to become an amicus curiae. After rendering a decision containing its findings of fact and conclusions of law, the district court entered a judgment denying Cotton the relief requested. From that judgment Cotton appeals. In addition to the primary issue framed at the outset, Cotton argues that mandamus is an appropriate remedy to obtain relief for taxes paid without protest. Because we uphold the constitutionality of the taxes paid, we do not reach that issue.

This appeal is unique in that the primary parties differ sharply as to the proper legal approach to apply. The state argues for the traditional preemption analysis under Indian law as applied in cases such as *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832

(1982), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). *See also Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir.1987). In the alternative, the state contends the challenged taxes survive scrutiny under standard Commerce Clause tests announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and applied in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

While agreeing with the state that the preemption analysis should be applied, the Tribe argues the state taxes will not survive that analysis. The Tribe, in its amicus brief, urges us to examine the state taxes "in terms of federal preemption of state law or unlawful infringement by state law on the right of reservation Indians to make their own laws."

Cotton, on the other hand, contends that this case is not a preemption case because the economic impact on the Tribe is minimal and is not a primary consideration.[2] Cotton urges this court to use preemption only as a backdrop to focus on the issue of multiple taxation. It asks us to adopt a new analysis to apply to non-Indian producers who enter into lease agreements with tribes for on-the-reservation operations.

No party disputes the *Tribe's* right to tax the mineral companies that do business on the Reservation. What Cotton challenges is the additional imposition of *state* taxes on such companies. In so challenging the taxes, Cotton contends that the traditional Commerce Clause

2 The district court's judgment holds that Cotton has standing to assert preemption and the state does not contend otherwise in its brief.

analysis of *Commonwealth* should not apply. Rather than requiring the amount of tax to be fairly related to services provided by the state, Cotton contends that the amount of tax should equal the benefits conferred. Cotton asks us to apportion the state taxes in relation to services provided. Where there is no economic impact on the Tribe, but there are multiple taxes imposed by the Tribe and the state, Cotton urges us to strike the state taxes currently imposed as an impermissible burden on interstate commerce.

In its judgment, the district court focused on the preemption analysis and determined that, because there was no impact on the Tribe, Cotton could not be relieved of the payment of state taxes. The district court also concluded that there was no legal requirement that expenditures equal revenues collected. Cotton contends that the state can impose the severance tax and emergency school tax only when the state shows such taxes are required to support state services to the activity subject to stat etaxation. Because the Tribe imposes its own taxes, which are primary, Cotton views the state taxes as imposing an impermissible multiple taxation burden on it.

Cotton bases its contentions upon footnote 26 of *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 158-59 (1982):

> [W]hen the activity taxed by the Tribe occurs entirely on tribal lands, the multiple taxation issue would arise only if a *State* attempted to levy a tax on the same activity, which is more than the *State's* contact with the activity would justify. In such a circumstance, any challenge asserting that tribal and state taxes create a multiple burden on interstate commerce should be directed at the state tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause.

Cotton claims the state's taxes are not justified in relation to the services provided to the Reservation by the state, and that the "focus of the 'particularized inquiry' [into federal, state and tribal interests] mandated by the United States Supreme Court is the balance or imbalance in state revenues generated off the Jicarilla Reservation when considered in light of State services and infrastructure provided the Reservation." Cotton provides extensive discussion and figures of the alleged disparity in taxes collected and benefits conferred. For example, Cotton points to evidence showing that for the tax years in question, 1981-1985, New Mexico provided services to Cotton's operations of only $89,384, while receiving in taxes for the same period $2,293,953. It also compares state services to the Reservation as a whole of $10,704,748 for years 1981-1985 with oil and gas revenues from all producers on the Reservation of $47,483,306. Thus, says Cotton, with a ratio of 5 to 1, New Mexico enjoys an "unlawful windfall." Cotton asserts that the state may "only impose its tax 'in return for the governmental functions it provides to those who must bear the burden of paying this tax.'" *Ramah Navajo School Bd., Inc. v. Bureau of Revenue.* Because the state has not provided many services, Cotton contends the taxes must fail.

Whether the state may tax a non-Indian oil and gas producer, in addition to taxes imposed by the Tribe has not been squarely decided by the United States Supreme Court. The footnote in *Merrion,* upon which Cotton relies, does not, as Cotton asserts, create a "Supreme Court mandate" or a "specific cause of action" to be used against the state. The footnote is dictum; indeed, the

Court stated "no opinion on the possibility of such a challenge." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. at 159 n.26. The Court intimated only that a state tax "might" be invalidated under the Commerce Clause if the state failed to justify it.

Using *Merrion,* Cotton attempts to carve an exception to the traditional *Commonwealth* test. Cotton states that state severance taxes "are, as a matter of law, primary and hence not subject to a commerce clause claim;" likewise, tribal taxes are primary and not subject to a Commerce Clause claim. Moreover, it concedes that had its operations been off the Reservation, "Cotton could not challenge the New Mexico taxes under *Commonwealth.*" Therefore, as we understand Cotton's argument, a traditional Commerce Clause analysis does not apply, and we must devise a new test comparing costs and benefits.

Cotton's position conflicts with established tax principles. There is no requirement that benefits conferred must equal taxes extracted. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue; Commonwealth Edison Co. v. Montana.* Where taxes overlap, as here with both tribal and state taxes imposed on the same activity, the proper test, we believe, is the one set out in *Commonwealth.* According to this test, a state tax does not offend the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady,* 430 U.S. at 279.

We note that *Commonwealth* examined the impact of a state tax on an activity occurring mostly on federal land.

We believe the analysis is equally applicable to the imposition of a state tax on an activity occurring on tribal land.

Under the *Commonwealth* analysis, there can be no argument that the substantial nexus requirement is met. Because Cotton's leases are located within New Mexico, the severance of minerals occurs entirely within the state.

Second, apportionment is not strictly an issue because no other state is taxing the severance. Even if we were to assume that a tribe were a state for purposes of this prong (and *White Mountain Apache Tribe v. Bracker* states otherwise), Cotton has cited no cases on multiple taxation to support its claim that *Merrion's* footnote 26 creates an exception to the *Commonwealth* test. *See In re Adoption of Doe*, 100 N.M. 764, 676 P.2d 1329 (1984) (the court need not review issues for which no authority is cited). Neither has Cotton shown evidence that the state tax unduly burdens or discriminates against interstate commerce. *Merrion v. Jicarilla Apache Tribe.* "[D]ifferent sovereigns can enjoy powers to tax the same transactions. Thus, the mere existence of state authority to tax does not deprive the Indian tribe of its power to tax." *Id.*, 455 U.S. at 151. Neither do we believe the existence of tribal authority to tax deprives the state of its power to tax.

Third, there is no evidence that the state tax discriminates against interstate commerce. In our case, as in *Commonwealth*, the tax "is computed at the same rate regardless of the final destination of the coal, and there is no suggestion here that the tax is administered in a manner that departs from this evenhanded formula." *Id.*, 453 U.S. at 618. There is no differential tax treatment between in-state and out-of-state consumers.

Finally, we believe the amount of tax imposed is fairly related to the services provided to Cotton. The state tax need not reimburse the state for the exact cost of specific services provided to the mining company. *Commonwealth Edison Co. v. Montana.* Neither is there a requirement that the state's power to tax an activity connected to interstate commerce be limited to the value of services specifically provided to that activity. *Id.* Absent proof that the state tax disrupts or burdens interstate commerce in some way, we will not deprive the state of its authority to collect the tax. It is " 'not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.' " *Commonwealth Edison Co. v. Montana*, 453 U.S. at 623-24 (quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938)).

We believe Cotton reads too much into the footnote in *Merrion.* We are bound by the decisions of the United States Supreme Court. This court was chastised by the United States Supreme Court in *Ramah Navajo School Board, Inc. v. Bureau of Revenue* for failing to follow the Court's directives. We now decline to adopt Cotton's approach of comparing dollar-for-dollar benefits. Applying the traditional analysis of *Commonwealth*, we hold as a matter of law that the state taxes in question do not im-

pose an impermissible burden on interstate commerce.[3] If the United States Supreme Court intended to invite a different analysis, the footnote Cotton relies on does not clearly reflect that intent. Until the Supreme Court instructs us otherwise, we will follow the pronouncement of *Commonwealth*. In so ruling, we recognize that the state too has a legitimate government interest in raising revenues. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Absent a showing by Cotton that this interest infringed on traditional notions of interstate commerce, we must affirm the district court.

While Cotton does not challenge the district court's conclusion on preemption, we feel constrained, in light of the Supreme Court's criticism in *Ramah*, 458 U.S. at 846, to discuss briefly the contentions made by the state and the Tribe.

The state argues that we should apply the traditional theory of preemption as used in Indian law. The preemption analysis requires an examination of three things: 1) the federal and tribal interests at stake; 2) whether the tax impacts those interests; and 3) whether the state interest justifies the impact on the other interests. Under this traditional preemption analysis, if the taxes do not impact the Tribe, we need look no further. The district court found, and Cotton did not seriously disagree, that

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[3] Following oral argument, Cotton moved to supplement its brief to cite authority that permits an appellate court to decide issues of fact where review is limited to documents. We granted the motion, however, in light of our decision, we find it unnecessary to decide the issue on the facts.

the imposition of state taxes on Cotton did not impact the Tribe.

The Mineral Leasing Act of 1938 applies to the Tribe's oil and gas leases. 25 U.S.C.A. §§ 396(a) to 396(g) (1983). A major purpose of the Mineral Leasing Act is "to ensure that Indians receive 'the greatest return from their property.'" *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985). The "firm federal policy of promoting tribal self-sufficiency and economic development" is paramount to a preemption analysis. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143 (footnote omitted). If, therefore, Cotton had demonstrated that the taxes imposed by the state interfered with the federal policy of promoting tribal economic development, the taxes would be preempted. We need not find that federal legislation *expressly* bars the state tax, only that the state tax conflicts with the policy underlying the 1938 Act. *Id.*

Under a strict preemption analysis, Cotton's claim would fail. Cotton, not the Tribe, pays the taxes in question. Neither does the record support a showing of interference with the Tribe's economic development or sovereignty. The Tribe's economic interests are not impeded in light of the fact that Cotton: 1) has drilled twelve new wells (direct testimony of Cotton's witness), 2) shows no signs of disrupting production because of the tax burden, and 3) reaps sufficient profits to pay taxes to the Tribe and state.

The Tribe concedes that state laws apply to non-Indians within the Reservation if the laws do not infringe on the Tribe's sovereignty and rights of self-government. Although the Tribe asserts that the multiple taxes interfere

with the Tribe's right to increase its taxes and thereby raise revenues for governmental services, the Tribe cites no evidence for this claim. The record contains no evidence of an impact of tribal sovereignty; indeed, the Tribe imposes its own taxes, which are not challenged by Cotton. The Tribe's own consultant indicated that the Tribe could charge an even higher tax despite the state taxes imposed on Cotton. The Tribe also recognized that no taxing authority could return dollar for dollar in services the amount of tax revenues it received.

We hold that the state taxes challenged do not impede federal interests under the commerce clause. Nor would Tribal interests be affected under a preemption analysis. We therefore affirm the district court. We also reject the approach taken by Cotton to obtain relief from those taxes. Instead, we will apply a traditional analysis under Supreme Court guidelines to determine the validity of the taxes.

The judgment of the district court is affirmed.

IT IS SO ORDERED.

/s/ William W. Bivins
WILLIAM W. BIVINS, Judge

WE CONCUR:
/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge
/s/ Rudy S. Apodaca
RUDY S. APODACA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COTTON PETROLEUM, et al., Plaintiffs-Appellants, vs. STATE OF NEW MEXICO, et al., Defendants-Appellees.	No. 9268 D.C. No. Santa Fe 82-2302 82-2081 William W. Bivins Presiding Judge A. Joseph Alarid Rudy S. Apodaca Judges (Filed September 24, 1987)

In this cause, a motion for rehearing having been filed by Appellants, and consideration having been had by all of the members of the original panel,

IT IS ORDERED that the motion for rehearing be DENIED.

/s/ William W. Bivins
Presiding Judge

B. Other Opinions and Orders Rendered by Courts in This Case.

FIRST JUDICIAL DISTRICT COURT

COUNTY OF SANTA FE

STATE OF NEW MEXICO

COTTON PETROLEUM, et al., Plaintiff (s), vs. STATE OF NEW MEXICO, et al., Defendant (s),	Endorsed Filed in My Office This March 10, 1986 SYLVIA L. SEDILLO District Court Clerk No. SF 82-2081 (C) SF 82-2302 (C)

DECISION OF THE COURT

The Court, having heard the evidence and the arguments of counsel, and having considered the Requested Findings of Fact and Conclusions of Law, now renders the following decision.

FINDINGS OF FACT

1. Plaintiffs Cotton Petroleum Corporation and United Crude (hereinafter collectively referred to as Cotton) are in the business of extracting oil and gas from the Jicarilla Apache Reservation located within the State of New Mexico.

2. Cotton sells its oil to Fiant Refinery pursuant to a contract that may be revoked on 30 days' notice. Oil is transported by truck from the wellhead across reservation and state roads to the Fiant Refinery located in Farmington, New Mexico.

3. Cotton sells its gas to Norwest Pipeline under a contract which contains a take-or-pay clause.

4. Cotton uses independent contractors and employees to operate, drill and maintain its wells. These independent contractors and most employees live off the Jicarilla Reservation, within the State of New Mexico. They use roads, schools, and other services provided by the state.

5. Cotton's oil and gas operations on the Jicarilla Reservation are profitable. Cotton has drilled three new wells in the past year and proposes to drill 12 more in 1986. Cotton receives oil and gas prices which are at least as good or better than oil and gas prices received by other producers.

6. The State of New Mexico imposes five separate oil and gas severance taxes on Cotton's operations.

7. The state imposes these same five taxes on all oil and gas extractive activities taking place within the state whether or not the activities occur on reservation land.

8. The economic and legal burden of paying the state taxes falls on Cotton or its buyers.

9. Cotton is non-Indian.

10. The Jicarilla Apache Tribe is not a party to this lawsuit. No economic burden falls on the tribe by virtue of the state taxes.

11. The relationship between Cotton and the Jicarilla Tribe is a commercial one. Such a relationship does not create in Cotton, nor impose upon it authority to represent the Jicarilla Tribe or its interests.

12. New Mexico provides substantial services to both the Jicarilla Tribe and Cotton. The amount of state expenditures on the reservation is approximately three million dollars per year. The state also provides the benefits of living in an organized society to Cotton and the tribe.

13. The state per capita spending per Jicarilla member is equal to or greater than the per capita spending on non-Indian citizens. The state does not discriminate against the Jicarilla Reservation nor its members in respect to state expenditures.

14. The state, the tribe and the federal government all provide services on the Jicarilla Reservation. The state provides services on the reservation not provided by the other two governments. The state provides services off the reservation which substantially benefit the reservation.

15. Jicarilla Apaches use many services provided by the state off the reservation.

16. The Jicarilla Tribe pays into a permanent fund, similar to New Mexico's permanent fund, which contains approximately $50,000,000. This amount represents a substantially greater per capita Jicarilla reserve than New Mexico's permanent fund contains per each New Mexico citizen.

17. The State of New Mexico, Energy and Minerals Department, Oil Conservation Division, regulates spacing and mechanical integrity of wells located on the Jicarilla Reservation as it does all other wells within the state.

18. The tribe has imposed an oil and gas severance tax since 1977. The tribe has recently imposed a privilege tax in the amount of 5%. The rate was chosen even after an economic consultant retained by the tribe concluded that an additional tax of at least 6% could be imposed by the tribe without having an adverse effect on oil and gas development on the reservation.

19. Imposition of state taxes in addition to the Jicarilla taxes on Jicarilla producers has not in any way deterred production of oil and gas from the reservation.

20. Cotton did not pay its taxes to the state under protest for periods prior to April, 1982 and for May and June, 1982. Cotton's payment of taxes for those periods was not due to an error.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes as a matter of law as follows:

1. The Jicarilla Apache Tribe has not challenged the imposition of the five state severance taxes at issue.

2. Cotton lacks standing to assert that imposition of the state's taxes is preempted by the 1938 Mineral Leasing Act or that those taxes infringe on the Jicarilla Apache Tribe's sovereignty.

3. The legal and economic burden of these taxes does not fall on the tribe but falls on Cotton or its purchasers.

4. The theory of public finance does not require expenditures equal to revenues but in fact there have been. The state's taxes satisfies both the commerce and due process clauses: the state has nexus with Cotton's severing activity; the taxes do not discriminate against interstate

commerce; the taxes are fairly apportioned; and the taxes are related to the services provided by the state.

5. The state's taxes are not pre-empted by applicable federal law, specifically the 1938 Mineral Leasing Act. The policies underlying the 1938 Act are set forth in both *Blackfeet*, 105 S. Ct. 2399 (1985) and *Crow*, 650 F.2d 1104 (9th Cir. 1981), *modified*, 665 F.2d 1390 (9th Cir.), *cert. denied*, 459 U.S. 916 (1982). Those policies are 1) to achieve uniformity in the law governing mineral leases on Indian Land; 2) to achieve the broad policies of the 1934 Indian Reorganization Act including revitalizing tribal government and giving tribal government control over leasing decisions and conditions; and 3) to encourage economic development. The taxes imposed by the state do not affect the tribe's ability to provide government services or its ability to regulate the development of tribal interests. Thus the state may impose its taxes on Cotton without violating the supremacy clause.

6. The Indian commerce clause does not invalidate the state taxes, nor does imposition of the tribal taxes preempt the state taxes because Congress has not delegated pre-emptive authority to the tribe. The New Mexico Enabling Act also does not invalidate the state taxes: the Enabling Act is only a disclaimer of state authority over reservation activities of a proprietary, not governmental nature. Taxation is a governmental function.

7. There is no legal requirement for a quid pro quo between taxes collected and benefits provided to any particular taxpayer. State collection of taxes from Cotton is not limited to an amount spent by the state to benefit Cotton.

8. The state's non-discriminatory and substantial expenditures made on the Jicarilla Apache Reservation give the state a valid interest in imposing its taxes on non-Indian commercial activity on the reservation. The state need not show that every dollar of state taxes collected from the Jicarilla Reservation was spent on the reservation. The state provides the benefits of an organized and civilized society to all of its citizens, Jicarilla and non-Indian alike, and to businesses, including Cotton, extracting oil and gas in the state.

9. Cotton failed to protest the payment of its oil and gas severance taxes under protest for periods before April, 1982 and for the months of May and June, 1982. Cotton has failed to comply with the refund statutes. A petition for writ of mandamus is not appropriate to order the state to refund taxes not paid under protest. Taxes paid under a mistake of law are not erroeously paid taxes. Cotton may thus not use the erroneous payment statutes, N.M. Stat. Ann. §§ 7-29-12, 7-30-16, 7-31-15, 7-32-17 and 7-34-11 (1978) to obtain a refund of taxes paid without protest.

All Requested Findings of Fact and Conclusions of Law of the Parties inconsistent with those found or which are not adopted by the Court are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Bruce E. Kaufman
BRUCE E. KAUFMAN
DISTRICT COURT JUDGE

STATE OF NEW MEXICO

COUNTY OF SANTA FE

IN THE DISTRICT COURT

COTTON PETROLEUM, et al.,

Plaintiffs,

v.

STATE OF NEW MEXICO, et al.,

Defendants.

Nos. SF 82-2081(C) and 82-2302(C), Consolidated

(Filed March 28, 1986)

FINAL JUDGMENT

This cause came on for trial on November 3, 1985. The plaintiffs appeared through their counsel Daniel Israel, and the defendant appeared through its counsel Paula Forney-Thompson and Frank D. Katz, Special Assistant Attorneys General. Having heard the evidence and argument presented in post-trial briefs, the Court hereby finds in favor of the defendant and against the plaintiffs.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of the defendant and against the plaintiffs;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Decision of the Court, its Findings of Fact and Conclusions of Law and its letter to counsel filed March 10, 1986, are incorporated herein by reference with the exception of conclusion of law number 2, which should be and hereby is corrected to read as follows:

2. Cotton has standing to assert that imposition of the state's taxes is pre-empted by the 1938

Mineral Leasing Act and that those taxes infringe on the Jicarilla Apache Tribe's sovereignty.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs' complaint for refund of taxes, declaratory and injunctive relief, its first amended complaint for refund of taxes, declaratory and injunctive relief, its nine supplemental complaints for refund of taxes, declaratory and injunctive relief, and its petition for writ of mandamus be and hereby are dismissed with prejudice.

/s/ Bruce E. Kaufman
DISTRICT COURT JUDGE

Submitted by:
/s/ Paula Forney-Thompson
PAULA FORNEY-THOMPSON
FRANK D. KATZ

Approved as to form:

____

DANIEL ISRAEL

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

COTTON PETROLEUM, et al.,

Petitioners,

vs.

NO. 17,344

STATE OF NEW MEXICO, et al.,

Respondents.

WRIT OF CERTIORARI

STATE OF NEW MEXICO

TO: Court of Appeals

GREETING:

WHEREAS, the Petitioners, through their attorneys, Martha A. Daly, Santa Fe, NM, Daniel H. Israel, Denver, CO and G. Samuel Schaumaman, Tulsa, Ok, did apply to this Court on October 14, 1987 for its review of the decision handed down by the Court of Appeals on September 17, 1987 in Cause No. 9268 entitled Cotton Petroleum, et al vs. State of New Mexico, et al; and

WHEREAS, the Supreme Court gave notice to the Court of Appeals on October 14, 1987, in compliance with Rule 12-502 of the Rules of Appellate Procedure, that an application for writ of certiorari had been filed in the above entitled cause; and

WHEREAS, a copy of the application for writ of certiorari has been served on Respondents in the above entitled cause.

NOW, THEREFORE, the writ of certiorari is hereby issued, and the Court of Appeals is hereby ordered to proceed no further in Cause No. 9268 pending the further Order of the Court.

WITNESS, The Hon. Tony Scarborough, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 3rd day of November, 1987.

(S E A L)

Rose Marie Archuleta
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE
OF NEW MEXICO
Tuesday, November 3, 1987

NO. 17,344

COTTON PETROLEUM, et al.,

Petitioners,

vs.

STATE OF NEW MEXICO, et al.,

Respondents.

The matter coming on for consideration by the Court upon Petition for Writ of Certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Petition for Writ of Certiorari is hereby granted, and the Writ of Certiorari shall issue from this Court as prayed for in the petition.

(SEAL)

ATTEST: A TRUE COPY.

/s/ Rose Marie Archuleta
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Tuesday, November 10, 1987

NO. 17,344

COTTON PETROLEUM, et al.,

Petitioners,

vs.

STATE OF NEW MEXICO, et al.,

Respondents.

This cause having heretofore been submitted and taken under advisement, and on November 3, 1987 a Writ of Certiorari having been issued by the Supreme Court;

NOW, THEREFORE, IT IS ORDERED that the Writ of Certiorari heretofore issued by this Court on November 3, 1987 is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 9268 is hereby returned to the Clerk of the Court of Appeals.

(SEAL)

ATTEST: A TRUE COPY

/s/ Rose Marie Archuleta
Clerk of the Supreme Court
of the State of New Mexico

C. Notice of Appeal.

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

Docket No. 9268

COTTON PETROLEUM CORP., et al.,

Plaintiffs/Appellants,

v.

STATE OF NEW MEXICO, et al.,

Defendants/Appellees.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

(Filed January 26, 1988)

Notice is hereby given that Cotton Petroleum Corp., et al., the Plaintiffs/Appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New Mexico, entered in this action on September 17, 1987 and the denial of rehearing on September 24, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted this 22nd day of January, 1988.

COGSWELL AND WEHRLE

/s/ Daniel H. Israel
Jane E. Lein
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Tel. [303] 861-2150

G. Samuel Schaunaman, II
General Attorney
Cities Service Oil and Gas
Corporation
Legal Division
P.O. Box 300
Tulsa, OK 74102

Sarah E. Bennett
Rothstein, Bailey, Bennett
Daly & Donatelli
136 Grant Avenue
P.O. Box 8180
Santa Fe, New Mexico 87504-8180

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF MAILING

I hereby certify that on this 25th day of January, 1988, a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States was sent by United States mail, postage prepaid, addressed to the following:

Paula Forney-Thompson
Frank Katz
Special Assistant Attorney Generals
Taxation and Revenue Department
P.O. Box 630
Santa Fe, NM 87509

/s/ Linda S. Knight

D. State Statutes Involved.*

New Mexico statutes annotated.

7-29-4. *Oil and gas severance tax*

A. There is imposed and shall be collected by the department a tax on all products that are severed and sold. The measure of the tax and the rates are:

(1) on natural gas severed and sold:

(a) except as provided in Subparagraph (b) of this paragraph, whichever of the following rates produces the greater tax 1) three and three-fourths percent of the value of products; or 2) using a pressure base of 15.025 pounds per square inch absolute and at a temperature of 60 degrees Fahrenheit a tax per one thousand cubic feet (mcf) of sixteen and three tenths cents ($.163) until June 30, 1990, after which the rate of three and three-fourths percent of the value of products shall be used; and

(b) from a new production natural gas well, three and three-fourths percent of the value of products; and

(2) on oil and other liquid hydrocarbons removed from natural gas at or near the wellhead, three and three-fourths percent of taxable value determined under Section 7-29-4.1 NMSA 1978.

7-30-4. *Oil and gas conservation tax*

A. There is levied and shall be collected by the division a tax on all products which are severed and sold. The measure of the tax shall be nineteen one-hundredths of one percent of the taxable value of sold products. Every interest owner shall be liable for this tax to the extent of

* These statutes are cited in relevant part only.

his interest in the value of such products, or to the extent of his interest as may be measured by the value of such products.

7-31-4. *Privilege tax (emergency school tax)*

There is levied and shall be collected by the division a privilege tax on the business of every person severing products in this state. The measure of the tax shall be three and fifteen one hundredths percent of the taxable value of such products.

Every interest owner, for the purpose of levying this tax, is deemed to be in the business of severing products and is liable for this tax to the extent of his interest in the value of such products, or to the extent of his interest as may be measured by the value of such products.

7-32-4. *Ad valorem production tax*

There is levied and shall be collected by the division an ad valorem tax on the assessed value of products which are severed and sold from each production unit at the rate certified to the division by the department of finance and administration under the provisions of Section 7-37-7 NMSA 1978. Such rate shall be levied for each month following its certification and shall be levied monthly thereafter until a new rate is certified. Every interest owner shall be liable for this tax to the extent of his interest in the value of such products, or to the extent of his interest as may be measured by the value of such pdoucts.

7-34-4. *Ad valorem equipment tax*

An ad valorem tax is levied on the assessed value of the equipment at each production unit. The tax shall be at

the rate certified to the division by the department of finance and administration under the provisions of Section 7-37-7 NMSA 1978.

E. Federal Statutes Involved.*

Indian Mineral Leasing Act, 25 U.S.C. § 396a

§ 396a. *Leases of unallotted lands for mining purposes*

Hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians, under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act [25 USCS §§ 396a et seq.], may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribunal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

(May 11, 1938, ch. 198, § 1, 52 Stat. 347.)

Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a

§ 450a. *Congressional declaration of policy*

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

* These statutes are cited in relevant part only.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.
(Jan. 4, 1975, P. L. 93-638, § 3, 88 Stat. 2203.)

Indian Finance Act, 25 U.S.C. § 1451

§ 1451. *Congressional declaration of policy*

It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

(Apr. 12, 1974, P. L. 93-262, § 2, 88 Stat. 77.)

F. Listing Of All Publicly Held Parent Companies, Subsidiaries (Except Wholly Owned Subsidiaries) And Affiliates.

LISTING REQUIRED BY RULE 28 OF THE SUPREME COURT RULES

Cotton Petroleum Corporation is a wholly owned subsidiary of Occidental Oil and Gas Corporation, which is a wholly owned subsidiary of Occidental Petroleum Investment Company, which is a wholly owned subsidiary of Occidental Petroleum Corporation.

The subsidiaries of Cotton Petroleum Corporation are as follows:

Ione Gas Processing Company
Lake Energy Gathering, Inc.
United Crude Company
Wewoka Exploration Company

To the best knowledge of counsel, affiliates of Cotton Petroleum Corporation that may have securities in the hands of the public are:

Occidental Petroleum Corporation
Natural Gas Pipeline Company of America
IBP, Inc.
Cities Service Company
Occidental International Finance N.V.
United Energy Resources, Inc.
Canadian Occidental Petroleum, Ltd.

MOTION

No. 87-1327

IN THE

Supreme Court of the United States

October Term, 1987

COTTON PETROLEUM CORPORATION, et al.,
Appellants,

v.

STATE OF NEW MEXICO, et al.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

MOTION TO DISMISS

DANIEL YOHALEM
Counsel of Record
DEBORAH A. MOLL
Special Assistant Attorneys General
New Mexico Taxation and Revenue Department
P. O. Box 630
Santa Fe, New Mexico 87509-0630
(505) 827-0730
Counsel for Appellees

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IN THE

Supreme Court of the United States

October Term, 1987

COTTON PETROLEUM CORPORATION, et al.,
Appellants,

v.

STATE OF NEW MEXICO, et al.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

MOTION TO DISMISS

Appellees, represented here by the New Mexico Taxation and Revenue Department (hereinafter Department), hereby move to dismiss this appeal on the ground that the questions raised by Appellants Cotton Petroleum Company, et al. (hereinafter Cotton) do not present substantial federal questions. In support of this motion, the Department shows:

1. This case turns on facts unique to Cotton and its arrangements with the Jicarilla Apache Tribe. Thus, any decision in this case will have little general application. The trial record, the District Court's Findings of Fact and the Court of Appeals'

Opinion all demonstrate that the state's taxes are imposed solely on Cotton, a non-Indian oil company, have no actual economic consequences to the Jicarilla Apache Tribe, either directly or indirectly, and do not interfere with tribal self-government. Because there is no impact on the Tribe, the difficult balancing of interests required by the federal preemption doctrine invoked by Cotton need not be undertaken at all in this case.[1]

2. To the best of the Department's knowledge, Cotton's novel Commerce Clause argument has not been ruled upon by any other state or federal appellate court. Thus, there is no judicial conflict on this issue needing plenary review by the Supreme Court at this time.

3. The decision of the New Mexico Court of Appeals is correct and demonstrates that that court carefully considered Cotton's arguments and properly applied governing case law.

STATEMENT OF THE CASE

Cotton is a non-Indian petroleum company in the business of extracting oil and gas from the Jicarilla Apache Reservation located within the State of New Mexico. District Court Findings (hereinafter Findings), paras. 1 and 9, App. 14 and 15. Under the terms of its leases with the Jicarilla Apache Tribe, the oil which Cotton extracts belongs to Cotton. Cotton makes all production and marketing decisions. Cotton pays the Tribe royalties and rents for the oil. Jurisdictional Statement at 4.

[1] Although Cotton asserts there are a large number of other cases like Cotton's (Jurisdictional Statement, p. 8, n.5), it does not support that assertion nor provide many examples. Of the cases it does mention, apparently none has reached a decision on whether the Tribes involved have been harmed. Furthermore, the cases in New Mexico allege harm to the Tribe, whereas no harm to the Tribe has been shown in this case.

The New Mexico taxes at issue here were imposed on Cotton, not the Tribe, and no economic burden whatsoever falls on the Tribe by virtue of the state taxes. Findings paras. 6, 8, and 10, App. 15. The cost of the tax is not passed along in any way to the Tribe, nor is any federal or tribal fund which is available to the Tribe reduced by the taxes. Cotton will not pass on to the Tribe any tax refund it might get through this litigation.

Cotton's oil and gas operations on the Jicarilla Reservation are profitable. Findings, para. 5, App. 15. Cotton receives oil and gas prices which are at least as good or better than oil and gas prices received by other producers. *Id.* Imposition of the Tribe's tax in addition to the state's tax has not deterred Cotton's development of additional wells on the reservation. Indeed, Cotton has continued to expand its reservation oil production. *Id.*

Cotton sells its oil to refineries off the reservation in New Mexico and transports it there by truck. Findings, para. 2, App. 14. Cotton uses independent contractors and employees to operate, drill and maintain its wells. Findings, para. 4, App. 15. These independent contractors and most employees live off the Jicarilla Reservation, within the State of New Mexico. *Id.* They use roads, schools, and other services provided by the state. *Id.* New Mexico provides substantial services to both the Jicarilla Tribe and Cotton. Findings, para. 12, App. 16. The amount of state expenditures on the reservation is approximately $3,000,000 per year. *Id.* The state also provides the benefits of living in an organized society to Cotton and the Tribe. *Id.* The state per capita spending per Jicarilla member is equal to or greater than the per capita spending on non-Indian citizens. Findings, para. 13, App. 16. The state does not discriminate against the Jicarilla Reservation nor its members in respect to state expenditures. *Id.* The state, the Tribe and the federal government all provide services on the Jicarilla Reservation. Findings, para. 14, App. 16. The state provides services on the reservation not provided by the other

two governments. *Id.* The state provides services off the reservation which substantially benefit the reservation. *Id.* Jicarilla Apaches use many services provided by the state off the reservation. Findings, para. 15, App. 16. The Jicarilla Tribe deposits its taxes into a permanent fund which contains approximately $50,000,000. Findings, para. 16, App. 16. This amount represents a substantially greater per capita Jicarilla reserve than New Mexico's permanent fund contains per each New Mexico citizen. *Id.*

The State of New Mexico imposes five taxes on all persons extracting oil and gas within the state. The total amount of these taxes equals about eight percent of value. Court of Appeals Opinion, App. 2. The total amount of taxes imposed by the Jicarilla Tribe equals about six percent. *Id.* The rate of the Tribe's taxes was set lower than the rate proposed by the Tribe's own economic consultant, who had been retained to advise the Tribe on the effect of combined state and tribal taxes on oil and gas development on the reservation. Findings, para. 18, App. 16-17.

As a consequence of the absence of any economic impact on the Tribe and of any interference with the Tribe's ability to impose taxes, the Jicarilla Apache Tribe is not a party to this litigation and has never sought to intervene. Instead, the Tribe has participated solely as Amicus Curiae, raising hypothetical issues of possible harm not supported by the record in this case. By this posture, the Tribe is preserving for itself a second bite of the apple if and when the state's taxes have an actual impact on the Tribe.[2] The relationship between

[2] Brief Amicus Curiae of the Jicarilla Apache Tribe filed in the New Mexico Supreme Court in this case at p. 3: "Certain federal issues should be preserved to the Tribe, such as infringement and federal preemption, to be brought in a proper forum in the event the Tribe and state cannot work out their differences concerning the level of taxation and the delivery of services."

Cotton and the Tribe is a commercial one and does not create the authority for Cotton to represent the Tribe or its interests. Findings, para. 11, App. 15.

THE FEDERAL QUESTIONS ARE NOT SUBSTANTIAL, AND THE NEW MEXICO COURTS' RULINGS BELOW WERE CORRECT

A. Under the Facts of this Case, New Mexico's Taxes Are Not Preempted by Federal Law and Policies, Nor Do They Interfere with Tribal Self-Government.

The *sine qua non* of every case in which federal preemption has invalidated state taxation of non-Indians' activities on Indian reservations is that there was some harm to the Tribe resulting from the tax.[3] The harm may be direct, as in Montana's 30 percent tax on non-Indian coal production which entirely wiped out the Crow Tribe's own taxes and drove coal development to Wyoming, *see Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *affirmed*, 56 U.S.L.W. 3450 (Jan. 12, 1988); or it may be indirect, as in New Mexico's gross receipts tax on a building contractor who passed the cost of the tax along to the Navajo school board, thereby reducing federal grant-in-aid funds available to the school board, *see Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). But in every single preemption case decided by this Court, there has been clear proof of *actual* consequences to the Tribe that arise from interference with an important federal policy. *Id.*; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *California v. Cabazon Band of Mission Indians*, __U.S.__, 107 S. Ct. 1083

[3] The special federal preemption doctrine that applies to state taxation of the activities of non-Indians on tribal reservations requires a careful weighing of federal policy interests, tribal interests, the extent of the interference with these interests caused by the state's taxes, and the state's interest in collecting the tax. *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136 (1980); *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U. S. 832 (1983).

(1987). Similarly, cases invalidating state regulation or taxation on the related ground of interference with tribal self-government have been based on real, not conjectural, interference with the Tribe. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Cabazon, supra; Crow, supra.*

In this case, Cotton has not been able to demonstrate any actual harm to the Jicarilla Apache Tribe resulting from New Mexico's taxes. Oil development has continued apace and the Tribe has imposed and collected its taxes without interference. In recognition of this, the Tribe is not a party to this litigation, but has remained on the sidelines, asserting as Amicus Curiae conjectural harm not supported in the record. Having failed to present convincing evidence to the District Court of harm to the Tribe, Findings, paras. 8, 10, 18 and 19, App. 15-17, Cotton abandoned its preemption argument in oral argument before the Court of Appeals, conceded that the Tribe had not been harmed, and relied upon its novel Commerce Clause theory instead. Opinion of Court of Appeals, App. 4 and 10. Indeed, Cotton did not even brief the preemption issue in its Petition for a Writ of Certiorari to the New Mexico Supreme Court.

Now, in its Jurisdictional Statement, we find Cotton again asserting preemption and interference with tribal self-government. In doing so, it improperly dredges up isolated bits of evidence of harm to the Tribe that it introduced at trial; evidence which was rebutted by the Department and squarely rejected by the trier of fact in its Findings of Fact. Compare, for example, Cotton's Jurisdictional Statement at 15, n.13 with Findings, paras. 5, 16 and 19, App. 15-17. The Court of Appeals independently reviewed the record on this issue.[4] It rejected the assertions Cotton now makes and concluded:

4 "While Cotton does not challenge the district court's conclusion on preemption, we feel constrained, in light of the Supreme Court's criticism in *Ramah*, 458 U.S. at 846, to discuss briefly the contentions made by the state and the Tribe." Opinion of the New Mexico Court of Appeals, App. 10.

> Cotton not the Tribe, pays the taxes in question. Neither does the record support a showing of interference with the Tribe's economic development or sovereignty. The Tribe's economic interests are not impeded in light of the fact that Cotton: 1) has drilled twelve new wells (direct testimony of Cotton's witness), 2) shows no sign of disrupting production because of the tax burden, and 3) reaps sufficient profits to pay taxes to the Tribe and the state.
>
> The Tribe concedes that state laws apply to non-Indians within the reservation if the laws do not infringe on the Tribe's sovereignty and rights of self-government. Although the Tribe [as Amicus] asserts that the multiple taxes interfere with the Tribe's right to increase its taxes and thereby raise revenues for governmental services, the Tribe cites no evidence for this claim. The record contains no evidence of an impact on tribal sovereignty; indeed, the Tribe imposes its own taxes, which are not challenged by Cotton. The Tribe's own consultant indicated that the Tribe could charge an even higher tax despite the state taxes imposed on Cotton.

App. 11-12. Thus, because there has been no showing of any harm to the Tribe from the state's taxation of Cotton, the state's taxes should stand.

The facts of this case are crucially different from *Crow, supra,* affirmed recently by this Court. In the instant case, the Tribe is maximizing its return on the oil. Economic development though oil production has grown, in contrast to the sluggish performance of off-reservation oil development in recent years; and the Tribe is exercising its sovereignty through its own taxing authority. The facts in this case are also different from those in *Ramah, supra.* Cotton, not the Tribe, owns the

oil Cotton removes from the ground. In addition, Cotton must ship the oil off the reservation elsewhere in New Mexico to have it refined and obtain value for it. Thus, Cotton's extensive operations necessarily take place both on and off the reservation simultaneously. To operate effectively, Cotton relies on a broad range of services provided by the state, both on and off the reservation. These services include construction and maintenance of state roads used to transport workers and equipment to the oil sites on the reservation and to transport oil off the reservation to be refined, police patrolling these roads, schools for the children of workers living off the reservation, recreational facilities, the state courts in which Cotton challenged the taxes, and the state Energy and Minerals Department's regulation of spacing and mechanical integrity of wells located on the Jicarilla Reservation. Findings, paras. 4, 14, 15 and 17, App. 15-16. In fact, the state spends approximately $3,000,000 per year on the Jicarilla Apache Reservation alone. Findings, para. 12, App. 16. And, as found by the District Court:

> The state per capita spending per Jicarilla member is equal to or greater than the per capita spending on non-Indian citizens.

Findings, para. 13, App. 16. Thus, unlike *Ramah*, there has been no harm to the Tribe *and* the services provided by the state more than justify the taxes.[5]

Perhaps in recognition of the weakness of its case, Cotton repeatedly tries to blur the very important distinction between it and the Tribe. The far greater protections (including tax

[5] Here, again, Cotton attempts to rely on rebutted testimony at trial that was rejected by the trier of fact. Contrast Cotton's Jurisdictional Statement at 6 and 11, n.9, with the Findings of Fact, paras. 12-15, App. 16. Cotton's assertions of "fact," are also misleading because they do not reflect the small size of the Jicarilla population. That is why per capita data are more relevant than aggregate figures. *See also*, Findings, para. 16, App. 16. Further they grossly understate state services. *See* Findings, paras. 12 and 14, App. 16.

exemption) that belong to the Tribe simply are not available to Cotton under the facts presented here. In spite of Cotton's efforts,[6] the federal preemption doctrine is not a magic wand which Cotton can wave to turn non-Indian commercial activities into protected Indian activities. The Tribe is not an injured party here and none of the prerequisities for preemption or interference with tribal self-government has been met.

B. Evidence of the Practical Effect of the Challenged State Taxes Does Not Show Any Burden on Interstate Commerce.

The State of New Mexico imposes certain taxes upon the business of oil and gas extraction carried on within its borders. Cotton has challenged the payment of these taxes on the ground, among others, that the taxes impose an undue burden on interstate commerce and are therefore unconstitutional under the Commerce and Due Process Clauses of the United States Constitution. This challenge comes to this Court only after extensive fact-finding and review of the evidence by the lower state courts. The evidence adduced at the hearing below showed that the practical effect of the state taxes upon non-Indian production and sale of oil and gas was nil, so that the state taxes imposed no burden on interstate commerce. The trier of fact in this case so found. Absent any showing of a burden on interstate commerce, the taxing scheme deemed necessary and appropriate by this state to provide an organized society for those living and working within its borders should be upheld by this Court.

[6] For example, in footnote 15 of its Jurisdictional Statement, Cotton tries to turn New Mexico's taxation of Cotton's extensive oil operations into taxation of the Tribe's real property. Nothing could be further from the truth. New Mexico is taxing Cotton's oil production activities, not the Tribe's. Cotton owns the oil it extracts and none of the state's taxes is passed along, directly or indirectly, by Cotton to the Tribe. As required by the Constitution, the state does not tax *tribal* activities on the reservation nor does it tax tribal property.

The Constitution only sets limits upon state taxation. It does not impose a *per se* ban against taxation of interstate commerce. As often stated by this Court, interstate commerce must "pay its way." *Postal Telegraph-Cable Co. v. City of Richmond,* 249 U.S. 252 (1919). This is so even though the imposition of state taxes increases the cost of doing business. *Western Live Stock v. Bureau of Revenue,* 303 U. S. 250 (1938). Neither does the Constitution thrust upon the judiciary the arduous legislative task of formulating what taxing scheme is most appropriate in any given circumstance. *Complete Auto Transit, Inc. v. Brady,* 430 U. S. 274 (1977); *Commonwealth Edison Co. v. Montana,* 453 U. S. 609 (1981). As stated by this Court in *State of Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 444 (1940):

> The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax . . . .

If the practical effect of state taxes is such that they place no burden on interstate commerce, the state is free to garner revenues as it deems necessary, "unembarrassed" by the Constitution. *State of Wisconsin v. J. C. Penney Co., supra; Mobil Oil v. Commissioner of Taxes,* 445 U. S. 425 (1980).

Abundant testimony was presented in the District Court on the practical effect of the challenged oil and gas taxes upon the non-Indian producers operating on the Jicarilla Apache Reservation. After due consideration of this evidence, the District Court made certain findings regarding the profitability of Cotton's operations within the Reservation and the effect of the state taxes upon the non-Indian producers and overall production on the reservation. Findings, paras. 1-20, App. 14-17. These findings are specific, comprehensive and cogent. They were challenged in detail by Cotton in the Court of

Appeals, but upheld by that court. Cotton now simply asserts that the District Court ignored the evidence presented by it. The findings themselves and the subsequent review of Cotton's challenge by the Court of Appeals belie this contention.

The District Court found that the imposition of state taxes upon Cotton's operations on the reservation, even though in addition to taxes imposed by the Jicarilla Apaches, did not adversely affect oil and gas production on the reservation. Findings, para. 19, App. 17. The District Court found that in spite of the additional taxes paid by producers operating from leases on the reservation, these companies received prices for their oil and gas which were as good or better than the prices received by producers operating off the reservation and subject only to state tax. Findings, para. 5, App. 15. The District Court further found that the producers bore the incidence of the tax; therefore, the cost of the tax came out of the producer's profits rather than the Jicarilla Apache Tribe's pocket. Findings, para. 8, App. 15. The court found, however, that even with the additional cost to Cotton of the state taxes, its operations on the reservation were profitable. Findings, para. 5, App. 15. Whether this profitability is due to the efficiency of Cotton's operations on the reservation, the volume of oil and gas extracted or the quality of oil and gas produced on the reservation, the oil and gas produced on the reservation is competitive with oil and gas produced off the reservation. The state taxes, then, do not make the oil and gas produced on the reservation less commercially attractive than that produced elsewhere in the state. There being no real burden on interstate commerce because of the state taxes, they do not contravene the Commerce Clause. This is so even though Cotton could make more money if no taxes were assessed. *Western Live Stock v. Bureau of Revenue, supra.*

The District Court also found that, even in the face of the challenged state taxes and the Indian tax, Cotton planned and did drill more wells on the reservation. Findings, para. 5,

App. 15. The District Court further found that an economic consultant hired by the Jicarilla Apache Tribe had concluded that the market could bear a higher tax and that, in view of this, the Tribe had recently imposed a five percent privilege tax on oil and gas production in addition to its severance tax. Findings, para. 18, App. 17. The District Court made a general finding that the state taxes had in no way deterred oil and gas production on the reservation. Findings, para. 19, App. 17. The weight of the evidence, then, was that the business of oil and gas production on the reservation suffered no restraints or additional burdens because of the imposition of the state taxes.

Cotton, a non-Indian producer, is complaining, in essence, that it is not allowed a "windfall" profit because it is severing oil and gas in New Mexico but from within a reservation. The tax "burden" to which Cotton objects is only 14 percent of value. This Court recently upheld under the Commerce and Due Process Clauses a severance tax "burden" of 30 percent of value. *Commonwealth Edison v. Montana, supra.* Regardless of the number of taxes imposed in New Mexico, the overall effect does not approach that resulting from one tax upheld by this Court in *Commonwealth.* The Constitution only guards against excessive tax burdens on interstate commerce; it does not guarantee equal profitability in and among all the taxing jurisdictions nor does it restrict the number of taxes if the overall practical effect of the taxes upon free trade among the various states is not adverse. Given the absence of harm to interstate commerce posed by the challenged taxes, the taxing scheme deemed necessary and appropriate by this state should not be disturbed.

C. The Lower Court Correctly Interpreted and Applied the Constitutional Precedents Regarding Interstate Commerce.

The State of New Mexico taxes the severance of oil and gas within its borders including that found under the Jicarilla

Apache Reservation.[7] The Jicarilla Apache Tribe also taxes the severance of this oil and gas. The overall effect of both state and Indian taxes is only to tax 14 percent of value. Cotton argues that the imposition of taxes by the state and the Indian

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[7] These taxes are intended to be taxes on the business of producing oil and gas and generally allow Cotton to deduct most of its payments to the Tribe (but not tribal taxes) from the taxable value of the oil and gas severed and sold by it. The Oil and Gas Severance Tax, Sections 7-29-1 NMSA 1978, *et seq.*, imposes a tax on all oil and gas products severed and sold. Certain deductions are provided by statute from the taxable value of the products severed including royalties paid or due any Indian tribe, pueblo or ward. § 7-29-4.1 NMSA 1978. This severance tax has been determined to be an excise rather than a property tax. *Flynn, Welch and Yates, Inc. v. State Tax Commission,* 38 N.M. 131, 28 P.2d 889 (1934). The Oil and Gas Conservation Tax, Sections 7-30-1 NMSA 1978, *et seq.*, imposes a tax upon all natural gas and oil products severed and sold. A percentage of this tax is deposited in a conservation fund and an oil and gas reclamation fund. § 7-30-4 NMSA 1978; § 7-30-14 NMSA 1978. Certain deductions from the taxable value are allowed, including deductions for royalties paid or due Indian tribes, pueblos or wards. § 7-30-5 NMSA 1978. Pursuant to these two acts, a taxable event only occurs after the oil or gas is not just severed but also sold, transported out of New Mexico or consumed. *See Yankee Atomic Electric Company v. New Mexico and Arizona Land Company*, 632 F.2d 855 (10th Cir. 1980). The Oil and Gas Emergency School Tax, Sections 7-31-1 NMSA 1978, *et seq.*, is a tax imposed on the privilege of engaging in the business of severing oil and gas products in the state. The tax is a percentage of the actual price of the product received at the production unit less certain deductions including any royalties paid or due any Indian tribe, pueblo or ward. § 7-31-2(D) NMSA 1978; § 7-31-4 NMSA 1978 and § 7-31-5 NMSA 1978. The Oil and Gas Ad Valorem Production Tax levies an ad valorem tax on the assessed value of oil and gas products severed and sold. Sections 7-32-1 NMSA 1978, *et seq.* The taxable value is again determined only after certain deductions are allowed, including royalties paid or due any Indian tribe, pueblo or ward. § 7-32-5 NMSA 1978. The Oil and Gas Production Equipment Ad Valorem Tax, Sections 7-34-1 NMSA 1978, *et seq.*, is a tax levied on the assessed value of wells and nonmobile equipment used at a production unit in connection with the severance, treatment or storage of oil and gas.

Tribe results in taxation by multiple sovereigns in violation of the Commerce Clause. Cotton urges this Court to strike down the New Mexico taxing scheme as unapportioned and asks it affirmatively to decide the proper division of taxes between the two "states." In that the state taxing scheme meets any test under the Due Process Clause and the Commerce Clause, the Court need not undertake the arduous legislative task requested by Cotton.

Even though Cotton's primary contention before the Court of Appeals was not that the taxes were unapportioned, that court considered the apportionment issue as well as the other components of the constitutional test. Cotton had argued below that the revenues received by the state did not equal the benefits provided by the state to Cotton or to the Tribe. Cotton essentially asked the Court of Appeals to treat the reservation as a state but then proposed a test which required the Court of Appeals to eschew recent precedents established by this Court under the Due Process and Commerce Clauses. Following this Court's specific rejection of the same "dollar-for-dollar benefits" test propounded by the appellants in *Commonwealth Edison Co. v. Montana, supra,* the Court of Appeals properly denied Cotton's request. Assuming that the protections of the Commerce Clause and Due Process Clause are invoked under the circumstances presented in this case where one taxing entity is a state and another a reservation, the Court of Appeals correctly reviewed the state taxing scheme in light of the standards established by this Court in *Commonwealth Edison* and *Complete Auto Transit, Inc. v. Brady, supra.*

As found by the Court of Appeals, there is sufficient nexus between the activity taxed and New Mexico. Not only is the oil and gas which is the subject of the tax found in New Mexico, but the business of extraction, transportation and sale of the product is carried on within the state. As with the severance tax upheld in *Commonwealth Edison Co. v. Montana, supra,*

there is no suggestion of a discriminatory administration of the tax. There is no evidence that the taxes are imposed differently upon oil and gas sold only intrastate or placed in interstate commerce. The facts further demonstrate that the taxes imposed are fairly related to the services provided to Cotton by the state. As found by the District Court, the state not only provides roads, schools and other services to Cotton and its employees off the reservation, it also maintains roads and performs certain police and regulatory functions assisting Cotton's operations on the reservation. The evidence presented below clearly established that the state provides an environment in which Cotton can successfully carry on its business. Its operations are extremely profitable. Neither the Due Process Clause nor the Commerce Clause mandate that a tax be an "assessment of benefits." *Commonwealth Edison Co. v. Montana,* 453 U. S. at 623. The only benefit to which the taxpayer is entitled is the provision of an organized society through the use of such taxes for the public welfare. *Commonwealth Edison Co. v. Montana, supra.* The Court of Appeals properly concluded that the tax was fairly related to the services provided to Cotton by the state.

Finally, the Court of Appeals was correct in ruling that apportionment was neither appropriate nor necessary. Apportionment is only a mechanism used to ensure that taxes are fairly related to services. If the facts show that the tax is already justified by the state's contact with the activity, apportionment is not necessary. *See, Merrion v. Jicarilla Apache Tribe,* 455 U. S. 130, 158 n.26 (1982), citing *Exxon Corporation v. Wisconsin Department of Revenue,* 447 U. S. 207 (1980); *Washington Revenue Department v. Association of Washington Stevedoring Cos.,* 435 U. S. 734 (1978); *Standard Oil Co. v. Peck,* 342 U. S. 382 (1952). As demonstrated above, New Mexico's taxes are fairly related to services and the state's taxing scheme should, therefore, be upheld.

CONCLUSION

For all of the reasons set forth above, Cotton does not present substantial federal questions necessitating plenary review by this Court and the Department's Motion to Dismiss should be granted.

Dated March 7, 1988.

Respectfully submitted,

DANIEL YOHALEM
Counsel of Record
DEBORAH A. MOLL
Special Assistant Attorneys General
New Mexico Taxation and
Revenue Department
P. O. Box 630
Santa Fe, New Mexico 87509-0630
(505) 827-0730

Counsel for Appellees

REPLY BRIEF

No. 87-1327

In The
Supreme Court of the United States
October Term, 1987

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

APPELLANTS' REPLY BRIEF

DANIEL H. ISRAEL, ESQ.
1100 Stout St., #850
Denver, CO 80204
Tel. [303] 629-1100

G. SAMUEL SCHAUNAMAN, II, ESQ.
Cities Service Oil and Gas Corporation
P. O. Box 300
Tulsa, Oklahoma 74102
Tel. [918] 561-4278

SARAH E. BENNETT, ESQ.
ROTHSTEIN, BAILEY, BENNETT, DALY & DONATELLI
500 Montezuma
Suite F
Santa Fe, NM 87504-8180
Tel. [505] 988-8004

Counsel for Appellants

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

APPELLANTS' REPLY BRIEF

A. ALL PARTIES AGREE THAT COTTON'S CLAIMS RAISE NOVEL AND IMPORTANT QUESTIONS AS TO THE APPLICABILITY OF COMMERCE CLAUSE PROTECTIONS TO STATE/TRIBAL MULTIPLE TAXATION

New Mexico (Motion to Dismiss, p. 2), the Jicarilla Apache Tribe (Amicus Curiae Brief, p. 8), and the Council of Energy Resources Tribes (Amicus Curiae Brief, p. 4) all confirm that the multiple burden tax claims raised by Cotton are novel, substantial, and far reaching. Cotton requests this Court to make a threshold determination as to whether the multiple burden protections found in the Commerce Clause apply to overlapping state/tribal

taxation. If they do not, then the future of Reservation mineral development will be bleak indeed, for as this Court has acknowledged, discriminatory taxes imposed on interstate commerce have an adverse competitive impact. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).[1]

If the Court determines that oil and gas operators, who elect to go on the Indian reservations in furtherance of federal policies encouraging Reservation economic development, are entitled to protection from multiple state/tribal taxation, then as set forth in our Jurisdictional Statement, the Court should apply its traditional apportionment and/or allocation teachings to eliminate the 75% penalty imposed on Reservation producers in New Mexico.[2]

This appeal raises a substantial and far reaching issue involving hundreds of operators doing business on a score of Indian Reservations in the western states. Indeed, over 150 tax complaints raising issues similar to Cotton have already been filed. *See* Jurisdictional Statement n.5. And contrary to New Mexico's claims, the discrimination

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[1] Perhaps the most absurd of the disputed District Court findings paraded by New Mexico is that New Mexico's overlapping taxes have *no* adverse effect on Reservation oil and gas development. *See* Motion to Dismiss, p. 11. Cf. Jurisdictional Statement, n.13.

[2] The 75% penalty has been significantly increased on the Jicarilla Indian Reservation as a result of the imposition of a new and third tax by the Jicarilla Apache Tribe as of January 1, 1988. The third tax is a possessory interest tax imposed at 7% of the leasehold value, here the value of the Cotton oil and gas leases. Excerpts from that new Jicarilla tribal tax are included in the Appendix to this Reply Brief.

against Reservation commerce at issue in all of these cases has nothing to do with "unique arrangements" made with the Tribes (Motion to Dismiss, p. 1). Rather, the multiple taxation emerges from unapportioned taxes imposed by New Mexico and other western states on Reservation operations.

In our view, this Court should determine the threshold federal question as to whether state/tribal overlapping taxation of Reservation mineral development is the constitutional equivalent of taxation by two states of the same interstate commerce activity. That novel federal question should not be left to the intermediate court in New Mexico, especially when the New Mexico Supreme Court elected not to even review this important issue. Moreover, to leave the resolution of this threshold problem to the New Mexico Court of Appeals is especially troublesome in light of the New Mexico court's insistence that the ruling in *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981) (involving severance activity subject to single state taxation) conclusively affirms New Mexico's power to tax without apportionment Jicarilla Reservation interstate commerce already subject to two, now three tribal taxes.[3]

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[3] New Mexico's cavalier dismissal of Cotton's multiple tax burden is predicated in part on a miscomprehension of the Court's Commerce Clause teachings. For example, New Mexico finds itself in the untenable position of relying on *State of Wisconsin v. J.C. Penney Co.*, 311 U.S. 435 (1930) and *Mobil Oil v. Commissioner of Taxes*, 445 U.S. 425 (1980) (Motion to Dismiss, p. 10) to support its unapportioned and unallocated taxes imposed on Jicarilla Reservation oil and gas operations, even though both *Mobil Oil* and *J.C. Penney* involved the Court's upholding of apportioned state taxes. If New Mexico's taxes were apportioned or allocated, then of course Cotton would not be seeking relief from the Court.

B. CONSTITUTIONAL SUPERVISION OF STATE/TRIBAL MULTIPLE TAXATION IS FULLY CONSISTENT WITH THE COURT'S CONTINUING CONCERN WITH UNAPPORTIONED TAXATION BY THE STATES

On February 22, 1988, the Court affirmed its long standing concern for protecting interstate commerce from discriminatory taxation by granting review in a novel and substantial multiple burden case involving interstate telecommunications. *Goldberg v. Sweet*, 512 N.E.2d 1262 (Ill. 1987), *jurisdiction noted*, 56 U.S.L.W. 1128 (U.S. Feb. 22, 1988) (Nos. 87-826 & 87-1101). While *Goldberg* involves different taxing entities than *Cotton*, the need to protect the integrity of interstate commerce is no less important in *Cotton* than in *Goldberg*.

Both raise substantial questions as to the applicability of Commerce Clause protections to emerging interstate commerce developments. In *Goldberg*, the new development is the break up of a national monopoly over long distance calls and the resulting transfer of long distance calls to regional telecommunications companies. *Goldberg* requires the Court to determine whether state taxation of interstate telecommunications must be apportioned in order to avoid the possibility of multiple taxation by sending and receiving states. The *Cotton* appeal presents the Court with the presence, not the mere possibility, of multiple taxation of the interstate flow of oil and gas, not by two states, but by a Tribe and a state. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Cotton's multiple taxation occurs because of its participation in federally promoted Reservation mineral activities subject to recently enacted tribal taxes, a development encouraged by federal policies and indeed expressly sanctioned by the Court in *Merrion*.

Moreover, the Court last term suppressed multiple taxation of interstate commerce utilizing the very teachings involved in *Goldberg* and *Cotton*. In *American Trucking Assoc. v. Scheiner*, 107 S. Ct. 2829 (1987), the Court struck down an unapportioned flat axle tax imposed by the State of Pennsylvania, even in the face of evidence that Pennsylvania expended considerable amounts of money to support the highway system enjoyed by interstate commerce. In contrast, the record in the *Cotton* appeal confirms that New Mexico's contribution to Cotton's primarily Reservation based activity is modest indeed. *See* Jurisdictional Statement, p. 6.[4] Cotton's multiple tax burden differs from the burden in *American Trucking* because Cotton's operations are not "theoreti-

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[4] While conceding that the *Cotton* appeal presents novel questions, under the Commerce Clause affecting many companies and several western states, New Mexico ignores its own role in imposing multiple tax burdens on Jicarilla Reservation operations. Instead, the State attempts to rewrite the Court's Commerce Clause teachings to require evidence of "excessive tax burdens" before Commerce Clause protections can be triggered. Motion to Dismiss, p. 12. But the Court has stated that Commerce Clause protections operate without regard to how "unequal" are the comparative intrastate and interstate tax burdens. *Maryland v. Louisiana*, 415 U.S. 725, 760 (1981). New Mexico also claims that because Cotton's operations were profitable notwithstanding the imposition of five New Mexico and two tribal taxes, no discrimination against interstate commerce exists. New Mexico ignores the Court's holding in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) that protections against discrimination imposed on interstate commerce apply without regard to whether the commerce involved is "thriving" or "struggling." 468 U.S. at 272. Hence, New Mexico's "excessive burden" defense is no defense at all.

cally" subject to multi-state taxation as in the case of the Pennsylvania truckers. To the contrary, as we have demonstrated, Cotton's Reservation mineral development is in fact subject to two, and now three significant tribal taxes imposed on top of New Mexico's five taxes.[5]

We urge the Court to take this appeal, because we believe that the need for Commerce Clause multiple burden supervision exercised by the Court in *Goldberg* and in *American Trucking* is even more compelling here—given the presence, not the mere possibi'ity, of substantial overlapping taxation by independent and competing taxing entities.[6]

C. CONCLUSION

For these reasons, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, or summary reversal.

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[5] The 75% Reservation tax penalty asserted against Jicarilla Reservation oil and gas operations is not unlike the penalty imposed on interstate buses recently referred to by the Court in *American Trucking*, 107 S. Ct. at 2844, quoting *Capital Grayhound Lines v. Bryce*, 339 U.S. 542, 557 (1950) (Justice Frankfurter dissenting): "And because it operates in other States there is danger—and not fanciful danger—that the interstate carrier will be subject to the privilege taxes of several States even though his entire use of the highways is not significantly greater than that of intrastate operators who are subject to only one privilege tax."

[6] The relief which Cotton seeks is fully consistent with the Court's insistence that the States may collect their "fair share of revenue from interstate commercial activity". *American Trucking*, 107 S. Ct. at 2833. Indeed, Cotton only seeks relief from the five New Mexico taxes to the extent that those taxes when imposed on an unapportioned or unallocated basis are not "justified." *Freeman v. Hewit*, 329 U.S. 249, 253 (1946).

Dated March, 1988.

Respectfully submitted,

DANIEL H. ISRAEL, ESQ.
1100 Stout St., #850
Denver, CO 80204
Tel. [303] 629-1100

G. SAMUEL SCHAUNAMAN, II, ESQ.
Cities Service Oil and Gas
Corporation
P. O. Box 300
Tulsa, Oklahoma 74102
Tel. [918] 561-4278

SARAH E. BENNETT, ESQ.
ROTHSTEIN, BAILEY, BENNETT,
DALY & DONATELLI
500 Montezuma
Suite F
Santa Fe, NM 87504-8180
Tel. [505] 988-8004

Counsel for Appellants

APPENDIX

(SEAL)
Dulce, New Mexico

NOTICE

POSSESSORY INTEREST TAX
JICARILLA APACHE TRIBE

On October 2, 1987, the Jicarilla Apache Tribal Council enacted a Possessory Interest Tax Ordinance levying an annual tax equal to seven percent (7%) of the value of possessory interests on the Reservation. Owners of possessory interests on the Reservation on January 1, 1988 are subject to the tax unless exempt under the Ordinance. A copy of the tax Ordinance together with tax reporting forms will be mailed to each known taxpayer and additional copies are available upon request from the Tribal Tax Administration Division.

As set forth in the Ordinance, "possessory interest" means any non-exempt interest in real property within the exterior boundaries of the Reservation. Examples of such interests include: (1) those held in fee (2) those held under lease (3) those held under an easement or right-of-way. The Ordinance provides that no possessory interest consisting of a utility service line or of a utility delivery or distribution facility which exclusively serves the Jicarilla Apache Reservation shall be subject to the tax. However, utility lines passing through the Reservation and providing service beyond the Reservation boundaries are subject to the tax. The Ordinance further provides that no possessory interest which is used primarily to conduct a retail business, as defined in the Ordinance, or which is used primarily to conduct a ranch or to provide a homesite shall be subject to the tax. Finally, the Ordinance provides that no possessory interest held by the

United States, by the Jicarilla Apache Tribe, by the State of New Mexico or a subdivision thereof, or by a municipality shall be subject to the tax.

Enactment of this tax is necessary in order for the Tribe to continue to provide essential governmental services on the Reservation. The Ordinance requires that every person who owns a taxable possessory interest on January 1st of each tax year must report the value of his interest by January 15th to the Tax Administration Division of the Tribe. Notice of tax assessment shall be mailed by the Division by February 1st, and payment of the tax is due within thirty (30) days of the date of said notice. Tax reports under the Ordinance are due January 15, 1988 and each year thereafter. Appeals on taxes paid under protest shall be made to the Tax Protest Panel of the Tribe whose decision may be appealed to the Tribal Court.

Any questions concerning this Ordinance may be addressed to the Tax Administration Division, Jicarilla Apache Tribe, P. O. Box 507, Dulce, New Mexico 87528, (505) 759-3242.

JICARILLA APACHE TRIBE
ORDINANCE OF THE TRIBAL COUNCIL

Re: Possessory Interest Tax
Ordinance No.: 88-R-152

WHEREAS, the budget of the Jicarilla Apache Tribe has increased substantially as a result of the need to provide essential governmental services to all persons, both members and non-members, working, residing, or doing business within the boundaries of the Jicarilla Apache Reservation; and

WHEREAS, the Tribal Council recognizes a need to raise revenues to continue providing tribal services within the Reservation boundaries which benefit all individuals and businesses on the Reservation; and

WHEREAS, a possessory interest tax with revenues dedicated to offset tribal governmental budgetary expenditures is an appropriate and equitable form of raising revenues to provide essential governmental services to residents and businesses on the Reservation; and

WHEREAS, a tax study commissioned by the Tribal Council indicates that a reasonable percentage tax on the assessed value of said possessory interests would generate tax revenues needed by the Tribe and still not have substantial impact on the businesses owning said possessory interests; and

WHEREAS, the Possessory Interest Tax Ordinance has been prepared by the tribal attorneys and recommended by the Mineral and Water Resources Committee of the Tribe; and

WHEREAS, the Supreme Court of the United States has specifically upheld the sovereign authority of Indian tribes to levy and collect taxes upon persons and businesses within the Reservation boundaries; and

WHEREAS, under the Constitution of the Jicarilla Apache Tribe, the Tribal Council may impose taxes and fees upon persons and businesses present within the Reservation boundaries, including non-members of the Tribe.

NOW, THEREFORE, BE IT ORDAINED by the Tribal Council of the Jicarilla Apache Tribe that effective as set forth hereinafter, a possessory interest tax is hereby imposed on all possessory interests within the Reservation boundaries as follows:

ORDINANCE NO. 88-R-152
POSSESSORY INTEREST TAX

§ 1. *Statement of Purpose.* It is the policy of the Jicarilla Apache Tribe to provide members and non-members of the Tribe residing, doing business or working within the Jicarilla Reservation with essential governmental services. To finance this governmental policy, the Jicarilla Apache Tribe in this Ordinance adopts a possessory interest tax which will provide the Tribe with a portion of the revenues necessary to fund essential governmental services within the Reservation boundaries which will benefit all individuals and businesses on the Reservation.

§ 2. *Tax Administration Division.* The Tax Administration Division of the Jicarilla Apache Tribe shall administer this Ordinance and shall keep all records and accounts concerning this tax. The Tribal Council shall from time to time designate an individual to be Director of the Tax Administration Division. Any inquiries concerning the Jicarilla Apache possessory interest tax shall be made through the Tax Administration Division of the Tribe.

§ 3. *Definitions.* Unless the context otherwise requires, in this Ordinance the following definitions shall apply:

(A) *Commercial Business.* "Commercial Business" shall mean any business for profit which is not a utility or a retail business, including but not limited to oil and gas operators and producers.

(B) *Constitution.* "Constitution" shall mean The Revised Constitution of the Jicarilla Apache Tribe adopted December 23, 1968 and approved by the Secretary of the Interior on January 9, 1969.

(C) *Court of Appeals.* "Court of Appeals" shall mean the Jicarilla Apache Court of Appeals as described in the Jicarilla Apache Tribal Code.

(D) *Jicarilla Apache Indian Reservation or Reservation.* "Jicarilla Apache Indian Reservation" or "Reservation" shall mean all lands subject to the jurisdiction of the Jicarilla Apache Tribe and includes any and all lands within the exterior boundaries of the Jicarilla Reservation, regardless of whether said land is owned in fee, whether said lands are Indian lands held in Trust by the United States, or whether said lands are otherwise held.

(E) *Market Value.* "Market Value" shall mean the value at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

(F) *Possessory Interest.* "Possessory Interest" shall mean any non-exempt interest in real property within the exterior boundaries of the Jicarilla Apache Indian Reservation, including but not limited to: (1) interests held in fee, (2) interests held under lease, and (3) interests held under an easement or right-of-way.

(G) *President.* "President" shall mean the President of the Jicarilla Apache Tribe.

(H) *Retail Business.* "Retail Business" shall mean any business for profit whose business operations consist primarily of the retail sale or lease of consumer goods or the retail sale of consumer services on the Reservation. Retail Business as defined herein does not include a utility.

(I) *Secretary.* "Secretary" shall mean the Secretary of the United States Department of the Interior.

(J) *Superintendent.* "Superintendent" shall mean the Superintendent of the Jicarilla Agency, Bureau of Indian Affairs.

(K) *Taxable Person.* "Taxable Person" shall mean any person or entity, including any individual, partnership, corporation or other legal entity, having ownership rights in any possessory interest within the Jicarilla Apache Indian Reservation.

(L) *Tribal Court.* "Tribal Court" shall mean the Jicarilla Apache Tribal Court as described in the Jicarilla Apache Tribal Code.

(M) *Tribe.* "Tribe" shall mean the Jicarilla Apache Tribe of the Jicarilla Apache Indian Reservation.

(N) *Utility.* "Utility" shall mean any privately or publicly held entity primarily engaged in supplying, transmitting, transporting or distributing electricity, oil, natural gas, natural gas products, water, carbon dioxide, liquid hydrocarbons, telephone, telegraph or other communication services, or transportation services.

§4. *Imposition and Rate of Tax.* The possessory interest tax set forth herein shall be imposed on the owner-

ship of possessory interests on January 1st of each year and shall be assessed at the rate of seven percent (7%) of the market value of the possessory interest as determined and computed in accordance with this Ordinance. Said rate of tax shall be and remain the same as herein established unless modified by resolution of the Tribal Council. Upon passage of any resolution changing the rate of tax, notice shall be given to all taxpayers and shall be published in newspapers of general circulation and posted or published at such places as the Tribal Council designates.

§ 5. *Computation of Value of Possessory Interest.* The market value of a possessory interest shall be computed as provided in this section or by any other method adopted by the Tax Administration Division of the Tribe which accurately reflects the market value of the possessory interest which is subject to taxation.

(A) *Date of Valuation.* All property that is subject to taxation under this Ordinance shall be valued as of January 1st of the tax year.

(B) *Method of Valuation.* The market value of a possessory interest shall include the value of any improvements, equipment, or other tangible personal property held or used by the taxpayer in connection with the taxable use of the possessory interest. Value shall be computed in accordance with the method for determining market value for purposes of property taxation under the State of New Mexico Property Tax Code, as amended, currently N.M. Stat. Ann. §§ 7-36-1 to 33 (Repl. 1986), and regulations adopted pursuant thereto. This reference to New Mexico law is solely for purposes of establishing a

method of valuation, and shall not be construed as a concession by the Jicarilla Apache Tribe that State law is otherwise applicable to the Tribe.

§ 6. *Tax Declaration and Designation of Natural Person.* Every entity or person owning any non-exempt possessory interest within the Reservation boundaries shall designate a natural person as the individual empowered by that taxable entity to act on behalf of the taxable entity with respect to all matters involving the possessory interest tax. Said designated natural person shall complete the forms distributed by the Tax Administration Division and shall provide the information required therein.

§ 7. *Reporting Requirements.* Each taxpayer shall comply with the following reporting requirements and such other requirements as are by rule or regulation adopted by the Tax Administration Division:

(A) *Forms.* The Tax Administration Division shall provide taxpayers with forms for the reporting of the value of all possessory interests to the Tribe. Information reported by the taxpayer on these forms shall be the basis for determination and assessment of tax due.

(B) *Reporting Date.* Each taxpayer shall report the value of its possessory interests by January 15th of the tax year.

(C) *Extension of Time.* Upon timely written request to the Tax Administration Division, a taxpayer may request an extension of time within which to report the value of its possessory interests; and for good cause shown, the Tax Administration Division may extend, for

a period not to exceed thirty (30) days, the reporting date, but no further extension shall be allowed. Such a request for extension, to be timely, must be received by the Tax Administration Division prior to the reporting date. Requests for extension received by the Tax Administration Division after the reporting date shall not be considered. If the Tax Administration Division extends the date for filing valuation reports for a taxpayer, the date for mailing the notice of tax assessment to that taxpayer provided for in § 8 of this Ordinance shall automatically be extended by the amount of additional time granted the taxpayer for filing the valuation reports.

(D) *Failure to Report, Administrative Valuation.* If a taxable entity fails to file substantially complete possessory interest tax reporting forms, or to otherwise provide requested information or documents within its possession or control which are relevant to a determination of the extent or value of its possessory interests, the Tax Administration Division may proceed to determine the market value of that taxable entity's possessory interests and to assess taxes accordingly. This assessment will be binding on the taxable entity unless it shows that the valuation, on the basis of the best information available to the Tax Administration Division, was clearly erroneous or unless the Tax Administration Division for other good cause shown relieves the taxable entity from the operation of this subsection.

(E) *Reporting Value of Exempt Interests.* No person or entity shall be required to file property valuation forms for any possessory interest which is exempt under § 12, provided that the Tax Administration Division

may require any person or entity to file the information necessary to establish the claimed tax exemption.

(F) *Authority of the Tax Administration Division.* The Tax Administration Division may by form or regulation require any taxable entity to file the information or documents deemed necessary for the proper and efficient administration of the tax.

(G) *Administrative Reports.* The Tax Administration Division shall report all possessory interest tax activities and collections to the Tribal Council at least annually.

§ 8. *Notice of Assessment and Payment of Taxes Due.* Notice of tax assessment and of the amount of tax due shall be mailed by the Tax Administration Division by February 1st of the tax year, unless that date has been extended pursuant to § 7(C) of this Ordinance. The assessment shall be effective as of January 1st of the tax year without regard to the date of mailing of the notice. The assessed tax shall be paid within thirty (30) days of the date of mailing said notice, unless another date is specified by the Tax Administration Division in the notice of assessment or the due date has been extended pursuant to § 9 of this Ordinance. Any taxes assessed shall be paid by check or money order made payable to the Treasurer of the Jicarilla Apache Tribe. Payment is timely made if it is postmarked before midnight on the date on which the tax is due or if it is delivered to the Office of the Treasurer of the Jicarilla Apache Tribe by certified mail or in person and a receipt is given before midnight on the due date.

§ 9. *Extension of Time For Paying Tax.* Upon the filing with the Tax Administration Division of a timely request for an extension of time within which to pay assessed taxes, and upon a showing of good cause, the Tax Administration Division may extend, for a period not to exceed sixty (60) days, the due date for payment of taxes assessed, but no further extension shall be allowed. Such a request for extension, to be timely, must be filed on or before the date the assessed taxes are due. The penalty for late payment as provided for in Section 10 of this Ordinance shall not apply to any payment for which an extension has been granted.

§ 10. *Penalty for Late Payment.* Any taxable entity or person failing to pay the amount of tax assessed by the due date, except in cases where extensions have been granted, shall pay a penalty on the outstanding balance in the amount of two percent (2%) per month of delay in making payment, pro rated to the actual date of receipt by the Tax Administration Division.

§ 11. *Lien for Taxes.*

(A) *Lien Against Possessory Interest.* The possessory interest tax shall be a lien against the possessory interest of the taxpayer in favor of the Jicarilla Apache Tribe to secure payment of the tax and any penalty and interest that become due. The lien under this subsection shall arise as of January 1st of the tax year, without notice or demand, and shall be a first lien and superior to any other interest in the property.

(B) *Lien Against Other Property.* If a taxpayer fails to timely pay the possessory interest tax after assessment, the amount of the unpaid tax, including any penalty and interest that becomes due, shall be a lien in favor of the Jicarilla Apache Tribe upon all property and rights to property of the taxpayer, including any on-Reservation oil and gas production. The lien imposed by this subsection shall arise at the time of the assessment, but shall be effective against any mortgagee, pledgee, purchaser, judgment creditor, lienor or other encumbrancer for value when notice of the lien has been filed as provided in subsection (C).

(C) *Notice of Lien.* A notice of the lien provided for in subsection (B) of this section shall be filed with the Secretary of the Jicarilla Apache Tribe and with the Superintendent of the Jicarilla Agency of the Bureau of Indian Affairs. The notice of lien shall identify the taxpayer whose tax liability is sought to be enforced and the date the tax was due, and shall state that the Jicarilla Apache Tribe claims a lien for the entire amount of tax claimed to be due, including applicable interest and penalty.

(D) *Release or Reduction of Lien.* The liens provided for in this section shall continue until the liability for payment of the full amount demanded in the lien is released by the Tribe. Partial payment of the amount due shall reduce the amount of the lien by the amount paid. The Tribe may release the lien when the payment of the tax, plus any penalty and interest, is adequately guaranteed by other security or by a surety bond.

(E) *Foreclosure.* The Tribe may foreclose upon the property subject to a lien by filing a civil action in tribal court, state court or federal court for that purpose. In the event of such a foreclosure, the property shall be sold in a commercially reasonable manner and the proceeds applied to the expenses of the foreclosure and then to the liability for costs, penalties, interest and tax. Any remaining balance shall be remitted to the taxpayer. Provided, that the Tax Administration Division may by regulation prescribe the circumstances in which property subject to a lien may be retained to offset the amount due, rather than being converted into money.

§ 12. *Exemptions.*

(A) *Service Lines.* No possessory interest used exclusively to operate a utility service line, utility delivery facility or utiity distribution facility which exclusively serves the Jicarilla Apache Indian Reservation shall be subject to this tax. Possessory interests used to operate utility lines passing through the Reservation and providing service beyond the Reservation boundaries shall be subject to this tax.

(B) *Governmental Entities.* No possessory interest held and used by the United States, by the Jicarilla Apache Tribe, by the State of New Mexico or a subdivision thereof, or by municipalities within that state shall be subject to this tax.

(C) *Retail Businesses.* No possessory interest which is used primarily to conduct a retail business shall be subject to this tax.

(D) *Ranches and Homesites.* No possessory interest which is used primarily to conduct a ranch or to provide a homesite shall be subject to this tax.

§ 13. *Method of Claiming Exemption.* Any person or entity owning both taxable and exempt possessory interests shall file with the Tax Administration Division a claim for any exemption under § 12 of this Ordinance. The claims for exemption shall be filed on the form provided by the Tax Administration Division and at the time of filing the valuation reports required by § 7, and shall be accompanied by a map clearly indicating the specific property for which exemption is claimed. Any person or entity owning only exempt possessory interests shall be required to claim such exemptions only at the written request of the Tax Administration Division.

§ 14. *Appeal Procedures For Protested Taxes.* Any protest to an assessment, a denial of a claim for exemption, a determination of value, or any other matter relating to the possessory interest tax may be raised only in conformity with this section. A protesting taxpayer shall timely pay its tax under protest and request a refund of all or part thereof by filing a Notice of Protest with the Tax Administration Division at the time of timely payment. Delinquent taxes may not be paid under protest. All protests accompanying timely payment of the tax shall be handled as follows:

(A) *Protests to Committee.* Any protest received shall be referred to the Mineral and Water Resources Committee of the Tribe or to the Committee's successor in responsibility. The Committee shall determine whether the protested tax shall be refunded in whole or in

part and shall report its decision in writing to the protesting party or his representative, the President of the Tribe, the Tribal Treasurer and the Director of the Tax Administration Division of the Tribe within five (5) working days of the date of determination of said protest. The Committee may request any additional information or hold such hearings or meetings as it determines are necessary in such a manner (either formal or informal) as it determines is necessary. The Committee may issue rules and regulations for the conduct of Committee meetings and tax protest hearings. The decision of the Committee shall be final unless appealed to the Tribal Court in accordance with the provisions of this Ordinance.

(B) *Appeals to Tribal Court.* Appeal from a determination of the Mineral and Water Resources Committee may be made to the Tribal Court, by filing a Notice of Appeal with the Clerk of the Tribal Court with copies to the Treasurer of the Tribe, to the Director of the Tax Administration Division and to the Chairman of the Committee within fifteen (15) days of the date of the decision of the Committee. The appeal may challenge the tax only to the same extent and upon the same theory as was asserted before the Mineral and Water Resources Committee. Upon receipt of an appeal from a decision of the Committee, the Court Clerk shall schedule a hearing before the Tribal Court. The protesting taxpayer may, at the hearing, present evidence and argument and be represented by counsel, at his own expense. The decision of the Tribal Court regarding the protest shall be made in writing and distributed to the protesting taxpayer or his counsel, the Director of the Tax Administration Division,

the Chairman of the Committee, the Treasurer of the Tribe, and the President of the Tribe within five (5) working days of the date of the decision. The decision of the Tribal Court shall be final unless appealed to the Court of Appeals in accordance with the provisions of this Ordinance.

(C) *Appeals to Court of Appeals.* Appeals from the determination of the Tribal Court may be made to the Court of Appeals by filing a Notice of Appeal with the Clerk of the Tribal Court, with copies to the Treasurer of the Tribe, the President of the Tribe, the Director of the Tax Administration Division and the Chairman of the Committee within fifteen days of the date of the decision of the Tribal Court. Upon the docketing of an appeal from the Tribal Court, the matter shall be handled pursuant to the appeals procedures established by the Jicarilla Apache Tribal Code. The written decision of the Court of Appeals shall be distributed to the protesting taxpayer or his counsel, the Director of the Tax Administration Division, the Chairman of the Committee, the Treasurer of the Tribe, and the President of the Tribe within five (5) working days of the date of decision. The decision of the Court of Appeals shall be final.

(D) *Payment and Segregation of Contested Amounts.* No protest shall be heard unless the assessed taxes have first been timely paid by the taxpayer to the Treasurer of the Tribe. The Treasurer shall hold any contested amounts without expenditure in an interest bearing account until a final determination is made on the protest. The Treasurer shall refund any taxes paid on which protests have been sustained, with interest as allowed by this

Ordinance, within thirty (30) days of the date of final decision.

(E) *Interest on Erroneous or Illegally Collected Taxes.* If any tax is found to be erroneous or illegally collected, interest at the rate of four percent (4%) per annum shall be allowed on the amount refunded.

(F) *Burden of Proof.* The assessment by the Tax Administration Division is presumed to be correct. The taxpayer has the burden of proof to establish that the protested tax was erroneous or illegally collected.

§ 15. *Collection Powers.* The Tax Administration Division, in the name of the Tribe, shall have full power to collect taxes and penalties assessed, including the power to file suit in Tribal Court or in any other court of competent jurisdiction, and to execute on any judgment by all appropriate legal remedies including attachment and seizure of the assets of any delinquent taxpayer.

§ 16. *No Waiver of Sovereign Immunity.* Any challenge to the validity or application of this Ordinance may be brought only in the courts of the Jicarilla Apache Tribe, and only in accordance with this Ordinance and the laws of the Jicarilla Apache Tribe. The Jicarilla Apache Tribe does not waive its sovereign immunity from suit in the courts of any other jurisdiction for any claim arising from this Ordinance or its application. The determination to refund all or part of a protested tax payment shall be made in accordance with the terms of this Ordinance. Any decision of the Tribal Court or the Court of Appeals made in accordance with § 14 hereof shall be final.

§ 17. *Severability.* If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

§ 18. *Use of Tax Proceeds.* Tax proceeds shall be deposited by the Treasurer of the Tribe in the general fund to be budgeted by the Tribal Council and expended to defray the costs of providing essential governmental services on the Reservation. The Treasurer of the Tribe may execute vouchers against this fund to make refund adjustments, payments of interest or payments for any purpose for which this Ordinance may require.

§ 19. *Amendment.* This Ordinance may be amended by resolution passed by the Tribal Council in accordance with The Revised Constitution of the Tribe. The Tax Administration Division shall notify taxpayers of any amendment.

§ 20. *Effective Date.* This Ordinance shall be effective as of the date of its enactment by the Tribal Council, subject to the approval of the Secretary of the Interior pursuant to Art. XI, § 2 of the Constitution of the Jicarilla Apache Tribe. If delay in obtaining the approval of the Secretary of the Interior causes the effective date of this Ordinance to be on or after January 1, 1988, this Ordinance shall be amended as follows only for tax year 1988:

(A) The date of imposition of the tax under § 4 and the date on which the lien under § 11(A) shall arise shall be thirty days after the date the Ordinance becomes effective;

(B) The date for reporting the value of possessory interests under § 7(B) shall be forty-five days after the date the Ordinance becomes effective;

(C) The date by which the Tax Administration Division shall mail the notice of tax assessment shall be sixty days after the date the Ordinance becomes effective; and

(D) The dates established by this section shall be subject to extension under § 7(C) and § 9 of this Ordinance.

CERTIFICATION

The foregoing Ordinance was enacted by the Tribal Council of the Jicarilla Apache Tribe on the 2nd day of October, 1987, by a vote of 8 for, 0 against, and 0 abstaining, at a duly called meeting at which a quorum of the Tribal Council members was present.

JICARILLA APACHE TRIBE

/s/ Leonard Atole
President

ATTEST:

/s/ Barbara Gonzales
Secretary

AMICUS CURIAE

BRIEF

No. 87-1327

In The
Supreme Court of the United States
October Term, 1987

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

BRIEF OF THE JICARILLA APACHE TRIBE AS AMICUS CURIAE IN OPPOSITION TO THE APPELLANTS

B. Reid Haltom
Wayne H. Bladh
Nordhaus, Haltom, Taylor, Taradash & Frye
500 Marquette, N.W., Suite 1050
Albuquerque, New Mexico 87102
(505) 243-4275
Counsel for Amicus Jicarilla Apache Tribe

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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CONSENT TO FILING

All parties to this appeal have consented to the filing of this Amicus Brief. The written consents have been separately filed with the Clerk of this Court under separate cover letter.

INTEREST OF AMICUS CURIAE JICARILLA APACHE TRIBE

The Jicarilla Apache Tribe is an Indian Tribe recognized by the United States government and organized under the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.* The Tribe and its reservation have recently been described by this Court in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

The Tribe has entered into five leases with Cotton Petroleum Corporation pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. § 396a *et seq.*, for the production of oil and gas from reservation trust lands. Cotton Petroleum is a small producer on the reservation owning less than 4% of the total number of wells. The Tribe has issued over 500 oil and gas leases on the reservation under the 1938 Act, 236 of which are active and upon which there are over 2500 wells. The Tribe has not issued any new leases since 1972. Instead, the Tribe has chosen to enter into Joint Exploration and Development contracts. The applicability of state taxes has had a direct impact on those negotiations.

In 1987 oil and gas revenues from royalties, rents and a privilege tax[1] constituted approximately sixty-nine percent (69%) of the Tribe's general operating revenues. The

1. Since 1976 the Tribe also has imposed a severance tax on oil and gas production, with the revenue going into a permanent fund, not available for general operating expenses. In addition, effective with the tax year beginning January 1, 1988, the Tribe has imposed a possessory interest tax on the reservation, which falls on oil and gas production equipment as well as other property. The possessory interest tax was not in effect when this case was tried.

Tribe uses those revenues to fund the provision of essential governmental services on the reservation. These services include the police department, tribal court, emergency ambulance services, community services, alcoholic rehabilitation, day care services, elderly care and commercial services.

The Tribe has an interest in the outcome of this appeal because state taxes on reservation oil and gas production directly affect the operating costs of the Tribe's lessees and non-Indian joint venturers. The existence of state taxes also affects the level of taxation the Tribe can reasonably impose. Cotton Petroleum is only one of approximately 100 lessees and operators. Therefore, the Tribe's stake in oil and gas development on its reservation is much broader than the individual interest of Cotton. These state taxes have a potentially negative impact on the economics of developing the Tribe's mineral resources. In addition, the state taxes effectively divert a significant portion of the value of the Tribe's mineral resource away from the reservation and into state coffers.

The Tribe did not intervene as a party in Cotton's tax refund claim, but did participate in the briefing before the New Mexico courts as an amicus curiae. Throughout this litigation the Tribe's only interest has been to preserve its own potential claims to challenge the state taxes under the special federal preemption doctrine this Court has developed in the area of Indian affairs. The integrity of the federal preemption doctrine, and its application on the Jicarilla Apache Reservation as a whole, are of vital interest to the Tribe entirely apart from the narrow business interests of any one producer.

This Court has consistently applied the special preemption doctrine to implement the overriding Congressional goal of tribal self-sufficiency and economic development. *California v. Cabazon Band of Mission Indians*, — U.S. —, 107 S.Ct. 1083 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). These goals reflect federal commitments to the Indian tribes, not to the non-Indian businesses who operate on the reservation. Thus, the Tribe's interest in the proper development and application of the preemption doctrine on its reservation is much more significant and more enduring than the interest of a single non-Indian business whose presence on the reservation may be transitory.

The Tribe takes no position on the merits of the Commerce Clause theory Cotton has litigated in the New Mexico courts. The Tribe is interested only in the second question presented by Cotton Petroleum's Jurisdictional Statement: whether the federal preemption doctrine bars state taxation of Cotton Petroleum's oil and gas production based on the facts Cotton proved at trial. The Tribe urges this Court to dismiss Cotton's appeal to the extent it relies on the federal preemption doctrine as an independent ground for reversal, because the appeal fails to raise a substantial federal question on that issue.

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ARGUMENT

THIS CASE DOES NOT RAISE A SUBSTANTIAL QUESTION CONCERNING THE APPLICATION OF THE FEDERAL PREEMPTION DOCTRINE TO STATE TAXATION OF MINERAL PRODUCTION ON THE RESERVATION

Prior to the filing of its Jurisdictional Statement, Cotton Petroleum did not contend that the federal preemption doctrine provided an independent basis for its tax refund claim. On the contrary, Cotton expressly disclaimed any such contention before the New Mexico Court of Appeals, and discussed the preemption doctrine only as a "backdrop" for its Commerce Clause argument. Cotton's concession that, in the state court, it "placed its primary emphasis on the Commerce Clause"[2] seriously understates the primacy of the Commerce Clause theory in the lower court. The New Mexico Court of Appeals accurately summarized Cotton's litigation theory below:

> Cotton, on the other hand, contends that this case is not a preemption case because the economic impact on the Tribe is minimal and is not a primary consideration. Cotton urges this court to use preemption only as a back-drop to focus on the issue of multiple taxation. It asks us to adopt a new analysis to apply to non-Indian producers who enter into lease agreements with tribes for on-the-reservation operations.

Cotton Petroleum v. State of New Mexico, — N.M. —, 745 P.2d 1170, at 1172; Jurisdictional Statement at App. 4.

Given this decision not to pursue a separate preemption claim, Cotton did not make the effort at trial to

2. See, Cotton Petroleum's Jurisdictional Statement at 18, n. 17.

prove any impact its state tax burden had on the Jicarilla Apache Tribe. Neither did Cotton seriously challenge on appeal the trial court's findings of fact that there was no such impact. *Id.*, 745 P.2d at 1174; Jurisdictional Statement at App. 10 to App. 11. Certainly, Cotton made no effort to analyze the impact on the Tribe caused by state taxes on other producers on the reservation. The Tribe was not a party to this litigation, and had no opportunity to establish the factual record that Cotton chose not to develop on this critical point.

As long as Cotton relied on the preemption theory only as a "backdrop" to its Commerce Clause argument and did not assert preemption as an independent basis for its claim, the Tribe perceived no serious danger in Cotton's limited trial record. Now, however, Cotton has attempted to assert the preemption theory as an independent basis for its appeal to this Court. The Tribe therefore must oppose Cotton's appeal.

The New Mexico Court of Appeals took Cotton at its word and treated the Commerce Clause theory as the real basis for the refund claim. The court therefore devoted most of its opinion to the consideration of Cotton's argument that the Commerce Clause requires a dollar for dollar equivalence between state taxes and state expenditures on the reservation. The court briefly discussed the preemption doctrine only because it felt "constrained"[3] to do so in light of this Court's criticism of the New Mexico court in *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, at 846 (1982). While necessarily quite brief given Cotton's litigation strategy, the court of appeals' discussion of preemption neither misstated the law nor misapplied it to the facts in the appellate record.

3. See, *Cotton Petroleum v. State of New Mexico, supra*, 745 P.2d at 1174; Jurisdictional Statement at App. 10.

The court below correctly looked to the Indian Mineral Leasing Act of 1938 as a primary expression of federal and tribal interests in ensuring that the Tribe receive the greatest return from its mineral property. The court further acknowledged the firm federal policy of promoting tribal self-sufficiency and economic development as paramount to a preemption analysis, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). The court then correctly focused on the failure of Cotton to prove the facts necessary to find preemption:

> If, therefore, Cotton had demonstrated that the taxes imposed by the state interfered with the federal policy of promoting tribal economic development, the taxes would be preempted. We need not find that federal legislation expressly bars the state tax, only that the state tax conflicts with the policy underlying the 1938 [Indian Mineral Leasing] Act.

Cotton Petroleum v. State of New Mexico, supra, 745 P.2d at 1175; Jurisdictional Statement at App. 11. The court of appeals concluded that the factual record before it did not show any interference with the relevant federal policies. *Id.* This Tribe as amicus had urged the court to reach a contrary conclusion.

Nonetheless, the New Mexico Court of Appeals cannot be faulted for deciding this case on the appellate record before it. Even though the Tribe vigorously rejects the

proposition that New Mexico's taxes on oil and gas production *reservation-wide* have no negative impact on the Tribe, in this litigation Cotton did not attempt to prove the nature or full extent of those impacts. Instead, Cotton focused on its own production and its own Commerce Clause theory, rather than federal preemption. Cotton chose not to develop fully the factual record necessary to evaluate a preemption claim, and chose not to make the legal arguments in the state courts to support an independent claim based on federal preemption. Having made these strategic choices below, Cotton should not be permitted to assert the preemption theory now. On the record of this case, there is no substantial federal question concerning the special preemption doctrine applicable in Indian reservation matters. The trial court's findings of fact support the conclusion stated by the New Mexico Court of Appeals in its brief discussion of the preemption doctrine.

The Tribe agrees with Cotton Petroleum that the question whether states may tax mineral production on Indian reservations is a very substantial and important issue for the Indian tribes, the states and the mineral producers, especially in the West. Precisely because it is such an important issue, this Court should not attempt to address it on the inadequate and limited factual record presented by Cotton Petroleum concerning its own economic situation. This is particularly true because Cotton did not pursue the preemption theory below as an independent basis for its refund claim. A case such as Cotton's, which used the preemption doctrine only as a "backdrop" to a very different legal theory under the Commerce Clause, is not

the proper vehicle for deciding the significant issues raised by application of the federal preemption doctrine to state taxation of mineral production throughout the reservation.

Earlier in this term, this Court summarily affirmed the Ninth Circuit's decision in *Crow Tribe of Indians v. State of Montana,* 819 F.2d 895 (9th Cir. 1987), *aff'd* 56 U.S.L.W. 3450 (January 12, 1988) (No. 87-343) invalidating under the federal preemption doctrine Montana's taxation of reservation coal production. The opinion of the New Mexico Court of Appeals below reached the opposite conclusion on the validity of New Mexico's taxation of Cotton's oil and gas production on the reservation. Nonetheless, the two opinions are not inconsistent on the issue of federal preemption. Each court merely applied this Court's precedents to the facts before it. The interests of the Jicarilla Apache Tribe are not threatened by the fact-specific statements on preemption made by the New Mexico Court of Appeals. The Tribe vigorously opposes plenary consideration of the federal preemption issue on the factual record of this case.

CONCLUSION

For the reasons stated, Cotton Petroleum's appeal does not present a substantial federal question on the issue of federal preemption. The appeal as to that issue should be summarily dismissed.

Dated March, 1988.

Respectfully submitted,

B. Reid Haltom
Wayne H. Bladh
Nordhaus, Haltom, Taylor,
Taradash & Frye
500 Marquette, N.W., Suite 1050
Albuquerque, New Mexico 87102
(505) 243-4275

Counsel for Amicus Jicarilla Apache Tribe

AMICUS CURIAE

BRIEF

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ON APPEAL FROM THE COURT OF APPEALS
OF NEW MEXICO

BRIEF OF AMICUS CURIAE COUNCIL OF
ENERGY RESOURCE TRIBES IN SUPPORT
OF APPELLEES' MOTION TO DISMISS

Richard Dauphinais, Esq.
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Amicus Curiae
Council of Energy Resource
Tribes

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Richard Dauphinais, Esq.
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Amicus Curiae
Council of Energy Resource
Tribes

INTEREST OF AMICUS CURIAE

The Council of Energy Resource Tribes is an organization of energy-producing Indian Tribes. They are affected by any decision relating to the taxation of energy companies doing business on Indian Reservations.

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Appellees.

Amicus Curiae the Council of Energy Resource Tribes supports the Motion to Dismiss the appeal in this case.[1/]

[1/] The Council of Energy Resource Tribes supports the Appellees' position only to the extent of seeking a dismissal of this appeal.

Appellants and Appellees have consented to the filing of this brief. Letters manifesting those consents have been filed with the Clerk of the Court.

INTRODUCTION

Appellants Cotton Petroleum Corporation and United Crude Company ("Cotton") produce and market oil and gas on trust land owned by the Jicarilla Apache Indian Tribe ("Tribe") on the Jicarilla Reservation ("Reservation").

The Tribe levies oil and gas production taxes that are applied to Cotton's activities on the Reservation. The Tribe's authority to assess those taxes was confirmed by this Court in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

The State of New Mexico also levies on Cotton taxes related to the production of oil and gas. Cotton filed suit in the First Judicial District of the State of New Mexico challenging the State's imposition of taxes on Cotton's activities on the Jicarilla Reservation.

The trial court ruled for the State. App. 14-21. The Court of Appeals of the State of New Mexico affirmed the trial court saying that the State's taxes did not constitute an impermissible burden on interstate commerce. App. 1-10. Although not raised by Cotton on appeal, the Court of Appeals went on to find that Tribal interests were not affected under a preemption analysis. App. 10-12. The New Mexico Supreme Court declined to review that decision. App. 24. Cotton appeals the judgment and opinion of the Court of Appeals.

The Jicarilla Tribe was not a party to the proceedings below.

ARGUMENT

Pursuant to Supreme Court Rule 16.1(d), amicus curiae the Council of Energy Resource Tribes supports the motion to dismiss this appeal.

The questions presented to this Court by Appellants indicate the interests of the Jicarilla Tribe in this case and the potential effect of this case on other Indian Tribes. In part, the first question is whether "the Commerce Clause require[s] apportionment or allocation of New Mexico's five oil and gas taxes imposed on a Jicarilla Indian Reservation oil and gas lessee who is also subject to two Jicarilla Apache Tribe oil and gas taxes. . . ". The second question is whether "the federal laws and policies protecting Jicarilla tribal self-government and promoting Jicarilla Indian Reservation economic development preempt New Mexico's oil and gas taxes. . .".

Clearly, issues important to Indian Tribes were involved in this case. The Jicarilla Tribe was not, however, a party to the proceedings. The lower courts

should not have ruled on the issues involved here without the presence of the affected Tribe as a party. This Court should only review a decision such as that presented here when the concerned Tribe was in a position to participate as a party in the lower courts. In addition, the development of the law by this Court should only take place in a case where all of the affected entities are before the Court as parties.

CONCLUSION

For the above reasons, this appeal should be dismissed.

Dated March, 1988.

Respectfully submitted,

Richard Dauphinais
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Amicus Curiae
Council of Energy Resource
Tribes

JOINT APPENDIX

(9)

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Daniel H. Israel, Esq.*
1100 Stout St., #850
Denver, CO 80204
Tel. [303] 629-1100

G. Samuel Schaunaman, II, Esq.
Oxy Usa Inc.
P.O. Box 300
Tulsa, OK 74102
Tel. [918] 561-4278

Jane E. Lein, Esq.
Cogswell and Wehrle, P.C.
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Tel. [303] 861-2150

Counsel for Appellants

Daniel Yohalem*
Deborah A. Moll
Special Assistant Attorneys General
New Mexico Taxation and Revenue Department
P.O. Box 630
Santa Fe, NM 87509-0630
Tel. [505] 827-0730

Counsel for Appellees

*Counsel of Record

Appeal Docketed January 26, 1988
Probable Jurisdiction Noted April 18, 1988

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OR CALL COLLECT (402) 342-2831

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NOTATION DIRECTING THE COURT TO THE LOCATION OF OPINIONS, DECISIONS, ORDERS, AND JUDGMENTS BELOW

The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Nov. 9, 1982–Plaintiffs' Complaint for Refund of Taxes, Declaratory and Injunctive Relief, filed in the District Court for the State of New Mexico, County of Santa Fe.

Jan. 4, 1983–Plaintiffs' First Amended Complaint for Refund of Taxes, Declaratory and Injunctive Relief filed.

Jan 14, 1983–Defendants' Answer and Affirmative Defenses filed.

Nov. 3, 1985–New Mexico District Court trial of action commenced.

March 10, 1986–Decision of the New Mexico District Court, Findings of Fact and Conclusions of Law, filed.

March 28, 1986–New Mexico District Court's Final Judgment filed.

April 18, 1986–Notice of Appeal to New Mexico Court of Appeals filed.

Sept. 17, 1987–Opinion and Order of the New Mexico Court of Appeals filed.

Sept. 24, 1987–Plaintiffs' Motion for Rehearing denied by New Mexico Court of Appeals.

Nov. 3, 1987–New Mexico Supreme Court grants Writ of Certiorari.

Nov. 10, 1987–New Mexico Supreme Court quashes issuance of Writ of Certiorari.

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT

COTTON PETROLEUM CORPORATION, a corporation, and UNITED CRUDE COMPANY, a corporation,

Plaintiffs,

v. No. SF82-2081C

STATE OF NEW MEXICO; OIL AND GAS ACCOUNTING DIVISION, TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO; and ANTONIO MARTINEZ, Director, New Mexico Oil and Gas Accounting Division,

Defendants.

FIRST AMENDED COMPLAINT FOR REFUND OF TAXES, DECLARATORY AND INJUNCTIVE RELIEF

(Filed Jan. 4, 1983)

For their claims against Defendants, Plaintiffs allege the following:

PARTIES:

1. Cotton Petroleum Corporation ("Cotton") is a Delaware corporation with its principal place of business in Oklahoma.

2. United Crude Company ("United Crude") is a Delaware corporation with its principal place of business in Oklahoma.

3. The Defendant Oil and Gas Accounting Division, Taxation and Revenue Department of the State of New Mexico is charged by statute with the responsibility of collecting the taxes levied by the New Mexico Oil and Gas Severance Tax Act, the New Mexico Oil and Gas Conservation Tax Act, the New Mexico Oil and Gas Emergency School Tax Act, the New Mexico Oil and Gas Ad Valorem Production Tax Act, and the New Mexico Oil and Gas Production Equipment Ad Valorem Tax Act, N.M. Stat. Ann. 1978 §§ 7-29-1 *et seq.*, 7-30-1 *et seq.*, 7-31-1 *et seq.*, 7-32-1 *et seq.*, and 7-34-1 *et seq.*, respectively. Defendant Martinez is the Director of the New Mexico Oil and Gas Accounting Division.

JURISDICTION

4. This Court has jurisdiction to hear these claims by the provisions of N.M. Stat. Ann. 1978 §§ 7-29-12, 7-30-16, 7-31-15, 7-32-17 and 7-34-11, and Art. VI, § 13 of the New Mexico State Constitution. Those statutory provisions also provide that Defendants are subject to service of process in this action.

FACTUAL ALLEGATIONS

5. Cotton Petroleum has acquired various oil and gas leases located on the Jicarilla Apache Reservation pursuant to a federal Indian leasing program enacted by Congress and supervised by the Secretary of Interior, which permits non-Indians to explore, develop and sever minerals held by the United States in trust on the Reservation. The federal scheme is designed to maximize both the tribal exercise of self-government and the economic

self sufficiency of the Reservation free of outside interference, utilizing the resources of the federal government, the Tribe, and third parties capable of undertaking resource development. By the terms of this program, all aspects of Cotton's operations on the Reservation are subject to a detailed and comprehensive federal regulatory scheme.

6. The leases referred to in paragraph 5 are identified by the Oil and Gas Accounting Division, Taxation and Revenue Department, State of New Mexico, under the production unit numbers 17020, 14375, 13573, 13126, 13574, 13575, and 12444.

7. Cotton's operations on the Reservation are not only subject to the terms of its ongoing contractual relationship with the United States and the Jicarilla Apache Tribe (the Tribe) but are also subject to the laws, ordinances and policies of the Tribe (subject to approval by the Secretary of the Interior) which exercises comprehensive powers of self-government on the Reservation. The Tribe and the Department of the Interior provide substantially all necessary governmental services on the Reservation, which frees the State of New Mexico from the obligation of providing on the Reservation the full scope of services that it provides throughout the non-Indian portions of the state. The revenues which New Mexico raises from the imposition of its oil and gas taxes on the Reservation bear no relation to its actual government costs associated with Reservation oil and gas production.

8. Cotton's oil and gas operations, including its agreement with United Crude described below, generate substantial royalty income to the Tribe and

increasing tribal tax revenues. Cotton's operations also provide employment and other economic benefits to the Tribe, in furtherance of federal policies which led to the creation of the Jicarilla Apache Reservation as a permanent homeland for the Tribe and which encourage the Tribe to undertake programs, with the aid of non-Reservation capital and expertise, to increase the economic self-sufficiency of the Reservation.

9. In an exercise of its sovereign power to tax, and in addition to the royalty income mentioned above, the Tribal Council of the Jicarilla Apache Tribe adopted in July 1976, the Jicarilla Oil and Gas Severance Tax (Ordinance No. 77-0-02, amended by Ordinance No. 77-0-195) which levies an oil and gas severance tax of $.05 per million British thermal units (Btu) of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation, and $.29 per barrel of crude oil or condensate produced on the Reservation and sold or transported off the Reservation. This ordinance has applied to the severance of production from Cotton's oil and gas leases on the Reservation since April 1977. The validity of this tax as applied to such severance was upheld by the United States Supreme Court in January 1982.

10. Since 1977, Cotton has paid to the Jicarilla Apache Tribe in excess of $500,000.00 in satisfaction of its tax liability to the Tribe for production from the leases identified in paragraph 5.

11. Pursuant to an agreement between United Crude and Cotton, United Crude is purchasing production from certain of Cotton's oil and gas wells

identified in paragraph 5. Also pursuant to this agreement, United Crude has been paying, on behalf of Cotton, all taxes levied on the production of those wells by the State of New Mexico and the Jicarilla Apache Tribe.

12. Since 1977, United Crude has paid to the Jicarilla Apache Tribe, on behalf of Cotton, in excess of $69,000.00 in satisfaction of that part of Cotton's tax liability to the Tribe which relates to the wells from which United Crude purchases production.

13. In addition to the tribal taxes identified in paragraph 10, Cotton has paid taxes to Defendants, without protest, pursuant to the statutes identified in paragraph 3 or similar predecessor statutes, in approximately the following amounts with respect to production and operations on the leases identified in paragraph 5:

$ 370.36	July 1977 taxes
$ 437.31	August 1977 taxes
$ 815.43	October 1977 taxes
$ 356.83	September 1977 taxes
$ 1,577.65	December 1977 taxes
$ 559.54	November 1977 taxes
$ 2,706.71	January 1978 taxes
$ 1,952.62	February 1978 taxes
$ 2,068.67	March 1978 taxes
$ 5,997.09	April 1978 taxes
$ 6,362.64	May 1978 taxes
$ 5,882.71	June 1978 taxes
$ 5,317.98	July 1978 taxes
$ 5,504.59	August 1978 taxes
$ 6,216.97	September 1978 taxes

$ 7,787.18	October 1978 taxes
$ 4,164.40	November 1978 taxes
$ 9,232.91	December 1978 taxes
$ 9,187.05	January 1979 taxes
$ 8,417.51	February 1979 taxes
$ 7,506.20	March 1979 taxes
$10,393.90	April 1979 taxes
$11,730.41	May 1979 taxes
$15,186.83	June 1979 taxes
$15,892.99	July 1979 taxes
$15,590.04	August 1979 taxes
$14,954.98	September 1979 taxes
$17,014.40	October 1979 taxes
$15,983.46	November 1979 taxes
$16,090.87	December 1979 taxes
$15,026.18	January 1980 taxes
$12,970.91	February 1980 taxes
$19,230.71	March 1980 taxes
$19,203.64	April 1980 taxes
$17,927.39	May 1980 taxes
$19,069.32	June 1980 taxes
$20,221.27	July 1980 taxes
$21,451.22	August 1980 taxes
$21,656.90	September 1980 taxes
$25,276.65	October 1980 taxes
$21,282.78	November 1980 taxes
$23,419.83	December 1980 taxes
$22,364.11	January 1981 taxes
$19,483.49	February 1981 taxes
$26,744.12	March 1981 taxes
$24,339.10	April 1981 taxes
$23,949.02	May 1981 taxes
$23,576.31	June 1981 taxes
$25,242.99	July 1981 taxes
$24,061.31	August 1981 taxes
$22,761.37	September 1981 taxes
$24,285.01	October 1981 taxes

$42,008.11	November 1981 taxes and Invoices 3533, 3954, including annual payment of Production Equipment Ad Valorem Tax
$23,516.37	December 1981 taxes
$21,518.53	January 1982 taxes
$18,723.52	February 1982 taxes
$21,134.75	March 1982 taxes

14. In addition to the tribal taxes identified in paragraph 12, United Crude has paid taxes to Defendants on behalf of Cotton, pursuant to the statutes identified in paragraph 3 or similar predecessor statutes, without protest, in approximately the following amounts with respect to production and operations on the leases identified in paragraph 5:

$30,076.90	March 1981 taxes
$36,757.49	April 1981 taxes
$33,166.48	June 1981 taxes
$32,963.41	May 1981 taxes
$35,442.15	July 1981 taxes
$31,524.38	August 1981 taxes
$28,243.92	September 1981 taxes
$31,852.73	October 1981 taxes
$25,254.19	November 1981 taxes
$32,763.25	December 1981 taxes
$31,478.82	January 1982 taxes
$26,878.28	February 1982 taxes
$22,976.54	March 1982 taxes
$28,188.54	April 1982 taxes
$21,886.04	May 1982 taxes

15. In addition to the Tribal taxes identified in paragraph 10, Cotton has paid taxes to the Defendants, under protest, approximately the following amounts with respect to production and operations on the leases identified in paragraph 5:

$25,897.17	April 1982 taxes, adjustments for March 1981 to May 1981
$22,227.97	May 1982 taxes
$21,899.09	June 1982 taxes, interest per Invoice #7006 and adjustments for August, September, October, and November 1981
$23,684.22	July 1982 taxes, interest per Invoice #7414, and adjustments for June 1982
$23,770.58	August 1982 taxes and interest per Invoice #7843

Payments remitted since those listed above have been or will be made under protest also.

16. In addition to the tribal taxes identified in paragraph 12, United Crude has also paid taxes to the Defendants on behalf of Cotton, under protest, in approximately the following amounts with respect to the production and operations on the leases identified in paragraph 5:

$33,342.49	June 1982 taxes
$26,519.03	July 1982 taxes
$29,245.36	August 1982 taxes

Payments remitted since those listed above have been or will be under protest also.

17. The tax payments described in paragraphs 13, 14, 15 and 16 are intermingled with tax payments made by oil and gas producers operating throughout New Mexico and are utilized by the State for general and school fund purposes, to finance an oil and gas conservation fund and an oil reclamation fund, to finance a severance tax bond fund and severance tax permanent fund, to assist the State to retire certain state bonds, and to assist selected local government units. The tax revenues collected from

Plaintiffs and other Reservation oil and gas producers generate for the State a significant portion of the value of the Reservation's oil and gas resources and the above-described expenditure of those tax revenues for state projects bears no relationship to the services, if any, related to the development of oil and gas developed on the Reservation which are provided by the State and its subsidiaries.

18. The New Mexico Attorney General's Office, in a letter dated September 28, 1982, and attached hereto as Exhibit A, informed Plaintiffs that if a protest is not made at the time the taxes are paid, there is no valid protest under the New Mexico statutes identified in paragraph 3, which allow for payment under protest and recovery, and that no remedy for obtaining a refund of such taxes exists. The New Mexico Oil and Gas Accounting Division has refused to refund the taxes paid by plaintiffs, whether or not under protest. Plaintiffs have thus exhausted all administrative remedies.

19. Cotton and United Crude are suffering actual and direct harm as a result of Defendants' imposition of New Mexico taxes which overlap the taxes currently being imposed on Cotton and United Crude by the Tribe. As a result of double taxation (imposed by Defendants and the Tribe), Plaintiffs' Reservation operations are in an economically disadvantageous position vis-a-vis operations undertaken by operators off the Reservation. The continuing imposition of New Mexico taxes in addition to present and future taxes imposed by the Tribe may impair Plaintiffs' ability to fully develop all of the Reservation resources they presently have under lease from the

Tribe as well as their ability to undertake future contractual relations with the Tribe. Further, the continuing imposition of the New Mexico taxes infringes upon the right of the Tribe to govern the Reservation and maximize its revenues from the Reservation's resources free of outside interference. Plaintiffs are suffering irreparable harm and have no adequate remedy at law.

CLAIM ONE

20. Paragraphs 5 through 19 are incorporated herein by reference.

21. The Constitution of the United States, Article I, Section 8, Clause 3, grants to the Congress of the United States exclusive authority over commerce with Indian Tribes. New Mexico's oil and gas related taxes imposed on plaintiffs' production of oil and gas from the Reservation have not been authorized by Congress. These New Mexico taxes therefore constitute an unlawful and unconstitutional interference with Congress' exclusive authority over Indian commerce.

CLAIM TWO

22. Paragraphs 5 through 19 are incorporated herein by reference.

23. Defendants' taxation of Plaintiffs' oil and gas operations on the Jicarilla Apache Reservation is preempted by federal and tribal law designed to maximize the economic self sufficiency of the Reservation free of

outside (including state) interference and therefore violates the Supremacy and Commerce Clauses of the United States Constitution.

CLAIM THREE

24. Paragraphs 5 through 19 are incorporated herein by reference.

25. Defendants' taxation of Plaintiffs' oil and gas operations on the Jicarilla Apache Reservation constitutes an unlawful multiple burden on commerce, in violation of the Commerce Clause of the United States Constitution.

CLAIM FOUR

26. Paragraphs 5 through 19 are incorporated herein by reference.

27. Defendants' taxation of Plaintiffs' oil and gas operations on the Jicarilla Apache Reservation constitutes an unreasonable burden on interstate commerce, in violation of the Commerce Clause of the United States Constitution.

CLAIM FIVE

28. Paragraphs 5 through 19 are incorporated herein by reference.

29. Defendants' taxation of Plaintiffs' oil and gas operations on the Jicarilla Apache Reservation violates the Due Process Clause of the United States Constitution, in that Defendants have no substantial nexus with those operations to support jurisdiction to impose such taxes.

CLAIM SIX

30. Paragraphs 5 through 19 are incorporated herein by reference.

31. The tribal severance tax, which is imposed on the oil and gas operations of the Plaintiffs, approved by the Secretary of the Interior pursuant to congressional delegated authority in the implementation of federal policy, preempts state taxation of Plaintiffs' oil and gas operations.

CLAIM SEVEN

32. Paragraphs 5 through 19 are incorporated herein by reference.

33. Defendants are required to give all producers of oil and gas on the Reservation a credit against New Mexico oil and gas taxes for the full amount of any and all severance taxes paid by such producers and sellers to the Jicarilla Apache Tribe.

CLAIM EIGHT

34. Paragraphs 5 through 19 are incorporated herein by reference.

35. All of the oil and gas taxes received by New Mexico from Plaintiffs' operations on the Reservation have been collected illegally, and the State has been unjustly enriched and has wrongly profited from the unlawful collection. As a result, Plaintiffs are entitled to a refund and to restitution of all illegally collected funds.

CLAIM NINE

36. Paragraphs 5 through 19 are incorporated herein by reference.

37. Defendants' position, that oil and gas taxpayers such as Plaintiffs are barred from seeking a refund for oil and gas related taxes unless they protest at the time of payment of such taxes, violates applicable New Mexico statutes as well as the Due Process Clause of the New Mexico and United States Constitutions in that Plaintiffs may then be left without any method for recovering such unlawfully collected taxes.

CLAIM TEN

38. Paragraphs 5 through 19 are incorporated herein by reference.

39. Defendants' taxation of Plaintiffs' oil and gas operations on the Jicarilla Apache Reservation violates 42 U.S.C. § 1983 by depriving plaintiffs, under color of law, of their federal constitutional and statutory rights as described in Claims One through Nine above.

WHEREFORE, Plaintiffs seek from this Court a declaratory judgment that the imposition of such state taxes on Plaintiffs' oil and gas operations on the Jicarilla Apache Reservation is unlawful, and an order restraining Defendants from collecting such taxes in the future. Plaintiffs further pray that this Court enter judgment in their favor for a refund of the taxes paid by them as set forth in paragraphs 13, 14, 15 and 16, for the refund of all taxes which are paid during the pendency of this action, together with interest, costs and attorneys' fees to the

extent provided by law, and for such other relief as this Court deems proper.

Date: December 28, 1982

/s/ Sarah Bennet /ls
Sarah Bennett, Esq.
Rothstein, Bailey, Bennett and Daly
136 Grant Avenue
Santa Fe, New Mexico 87501
(505) 988-8004

/s/ Lorna A. Schnase
Daniel H. Israel, Esq.
Lorna A. Schnase, Esq.
Dechert Price & Rhoads
999 18th Street, Suite 1601
Denver, Colorado 80202
(303) 623-1777

Caroline B. Benediktson, Esq.
Cotton Petroleum Corp.
Suite 4200, One Williams Center
P.O. Box 3501
Tulsa, Oklahoma 74102
(918) 560-3754

Attorneys for Plaintiffs

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

COTTON PETROLEUM CORP., *et al.*,
Plaintiffs,
vs. No. SF 82-2081(C)
STATE OF NEW MEXICO, *et al.*,
Defendants.

ANSWER AND AFFIRMATIVE DEFENSES

Defendants, by and through their undersigned attorneys and pursuant to Rule 8 of the New Mexico Rules of Civil Procedure, hereby submit their Answer and Affirmative Defenses to Plaintiff's First Amended Complaint for Refund of Taxes, Declaratory and Injunctive Relief.

ANSWER

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 1, 2, 5, 8, 9, 10, 11, and 12 and therefore deny them.

2. Defendants admit the allegations contained in paragraph 3.

3. With respect to paragraph 4, Defendants state that this is a legal claim and therefore requires no response.

4. Defendants deny the allegations contained in paragraph 6.

5. In response to paragraph 7, Defendants are without knowledge or information sufficient to form a belief as to the truth of averments contained in all but the last

sentence and therefore deny them. In response to the last sentence, Defendants state that this is a legal claim and therefore requires no response.

6. With respect to paragraphs 13, 14, and 16, Defendants admit that Plaintiffs have paid taxes to Defendants pursuant to statute, but state that further averments contained in paragraphs 13, 14, and 16 are legal claims which therefore require no response.

7. In response to paragraph 15, Defendants state that Plaintiffs have paid taxes to Defendants pursuant to statute, but deny that the May and June, 1982 taxes were paid under protest, and state that further averments contained in paragraph 15 are legal claims which therefore require no response.

8. In response to paragraph 17, Defendants admit that tax payments received by the State are used for various purposes throughout New Mexico, but state that further averments contained in Paragraph 17 are legal claims which therefore require no response.

9. In response to paragraph 18, Defendants would respectfully refer this Court to Exhibit A itself, and state that the further averments contained in Paragraph 18 are legal claims which therefore require no response.

10. In response to paragraphs 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, and 39, Respondents state that averments contained in these paragraphs are legal claims which therefore require no response.

11. In response to Paragraphs 20, 22, 24, 26, 28, 30, 32, 34, 36, and 38, Defendants incorporate herein by reference their responses set forth above, to Paragraphs 5 through 19 of the First Amended Complaint.

12. Any allegations contained in the Complaint not specifically addressed in this Answer are hereby denied.

FIRST AFFIRMATIVE DEFENSE

Petitioners lack standing to raise the issues stated in their Complaint.

SECOND AFFIRMATIVE DEFENSE

Petitioners have failed to state a claim upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

Petitioner's claims are barred by the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

Petitioners have failed to exhaust their administrative remedies.

FIFTH AFFIRMATIVE DEFENSE

This Court lacks jurisdiction over the subject matter of this complaint.

SIXTH AFFIRMATIVE DEFENSE

Petitioners have failed to join indispensable parties.

SEVENTH AFFIRMATIVE DEFENSE

Defendants have acted in good faith at times relevant hereto.

WHEREFORE, Defendants respectfully request that the First Amended Complaint and the relief requested therein be denied, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

/s/ Paula Forney-Thompson
PAULA FORNEY-THOMPSON

/s/ Lisa G. Gmuca
LISA G. GMUCA

Assistant Attorneys General
Taxation and Revenue
Department
Post Office Box 630
Santa Fe, New Mexico 87509-0630
(505) 988-2290

CERTIFICATE OF SERVICE

I hereby certify that I served copies of the foregoing to Plaintiffs by mailing copies to Sarah Bennett, Esq., Rothstein, Bailey, Bennett and Daly, 136 Grant Avenue, Santa Fe, New Mexico 87501, Daniel H. Israel, Esq. and Lorna A. Schnase, Esq., Dechert Price & Rhoads, 999 18th Street, Suite 1601, Denver, Colorado 80202; and Caroline B. Benediktson, Esq., Cotton Petroleum Corp., Suite 4200, One Williams Center, Post Office Box 3501, Tulsa, Oklahoma 74102; this 13th day of January, 1983.

/s/ Paula Forney-Thompson
PAULA FORNEY-THOMPSON

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 18, 1988

Mr . Daniel H. Israel
1100 Stout Street
#850
Denver, CO 80204

Re: Cotton Petroleum Corporation, et al.,
v. New Mexico, et al.
No. 87-1327

Dear Mr. Israel:

The Court today entered the following order in the above entitled case:

In this case probable jurisdiction is noted. The parties are invited also to brief and argue the following question: "Does the Commerce Clause require that an Indian Tribe be treated as a state for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe?"

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

/s/ Joseph F. Spaniol, Jr.

APPELLANT'S BRIEF

No. 87-1327 (10)

In The

Supreme Court of the United States

October Term, 1987

COTTON PETROLEUM CORPORATION, *et al.*,

Appellants,

v.

STATE OF NEW MEXICO, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

BRIEF OF APPELLANTS COTTON PETROLEUM CORPORATION, *et al.*

DANIEL H. ISRAEL, ESQ.*
1100 Stout St., #850
Denver, CO 80204
Tel. [303] 629-1100

G. SAMUEL
SCHAUNAMAN, II, ESQ.
OXY USA INC.
P.O. Box 300
Tulsa, OK 74102
Tel. [918] 561-4278

JANE E. LEIN, ESQ.
COGSWELL AND WEHRLE, P.C.
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Tel. [303] 861-2150

*Counsel of Record

Counsel for Appellants

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Does the Commerce Clause require apportionment or allocation of New Mexico's five oil and gas taxes imposed on a Jicarilla Indian Reservation oil and gas lessee who is also subject to two Jicarilla Apache Tribe oil and gas taxes, when New Mexico provides only a small fraction of the Reservation's essential government services and when the combined effect of the state and tribal taxes is to increase by 75% the on-Reservation tax burden?

2. Do the federal laws and policies protecting Jicarilla tribal self-government and promoting Jicarilla Indian Reservation economic development preempt New Mexico's oil and gas taxes levied on an oil and gas lessee of the Jicarilla Apache Tribe?

3. Does the Commerce Clause require that an Indian Tribe be treated as a state for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian tribe?

LIST OF PARTIES AND CORPORATE AFFILIATIONS

A list of the parties to this proceeding is included in the Jurisdictional Statement at 1 n.1, previously filed by Cotton Petroleum Corporation. A description of Cotton Petroleum Corporation's corporate affiliations, provided pursuant to United States Supreme Court Rule 28.1, was also included in the Jurisdictional Statement at App. 32.

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No. 87-1327

In The

Supreme Court of the United States

October Term, 1987

COTTON PETROLEUM CORPORATION, et al.,

Appellants,

v.

STATE OF NEW MEXICO, et al.,

Appellees.

On Appeal from the Court of Appeals of New Mexico

BRIEF OF APPELLANTS COTTON PETROLEUM CORPORATION, *et al.*

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals is reported at 745 P.2d 1170 (1987) and is reprinted in the appendix to the Jurisdictional Statement ("J.S.") at App. 1-12 previously filed with the Court. The trial court's findings of fact and conclusions of law are unreported. They are included in the J.S. at App. 14-21.

JURISDICTION

Appellants, Cotton Petroleum Corporation and its sister corporation, United Crude Company ("Cotton"), sued the State of New Mexico in the District Court for Santa Fe County, New Mexico, challenging the validity of five New Mexico oil and gas taxes which are imposed on the Jicarilla Apache Reservation ("Reservation") oil and gas severance and production activities of Cotton. On March 10, 1986, the district court entered findings of fact and conclusions of law, and on March 28, 1986 the district court entered a final judgment against Cotton in favor of New Mexico.

Cotton appealed to the New Mexico Court of Appeals which upheld on September 17, 1987 the judgment of the district court. Cotton filed a timely petition for rehearing which was denied on September 24, 1987. On November 10, 1987, the New Mexico Supreme Court quashed the November 3, 1987 issuance of a Writ of Certiorari. On January 26, 1988, Cotton's notice of appeal to the United States Supreme Court was filed in the New Mexico Court of Appeals. (J.S. at App. 25). This Court noted probable jurisdiction of Cotton's appeal on April 18, 1988. (Joint Appendix ("J.A.") at 20). The jurisdiction of this Court rests on 28 U.S.C. § 1257(2) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause, United States Constitution: "The Congress shall have power . . . [t]o regulate commerce

with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

The relevant texts of the New Mexico tax statutes and the federal statutes relating to the Jicarilla Apache Indian Reservation are included in the J.S. at App. 27-31.

STATEMENT OF THE CASE

A. Summary of Cotton's Reservation Oil and Gas Operations.

Cotton produces and markets oil and gas on approximately 15,000 acres of trust land owned by the United States for the benefit of the Jicarilla Apache Tribe ("Tribe") located on the Jicarilla Apache Indian Reservation, established by the Executive Order of February 11, 1887, 1 C. Kappler, Indian Affairs, Laws and Treaties 875 (1904). The Cotton leases were issued by the Tribe and the United States under the authority of the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a, and are administered by the Secretary of the Interior ("Secretary") and the Tribe pursuant to that federal statute, as well as 25 C.F.R. Part 211, 30 C.F.R. Parts 202 and 206, 43 C.F.R. Part 3162 and relevant tribal ordinances.

Cotton acquired its Jicarilla oil and gas leases in 1976 and in the years since has drilled 50 wells which operate side by side with 15 wells that were operating on the leased lands at the time of acquisition. Pursuant to the leases, Cotton pays a royalty to the Tribe of 12½% and rent of $125.00 per acre. In addition, Cotton pays an overriding royalty to its lease assignors of 12½% and pays three substantial oil and gas production taxes to the

Tribe.[1] The tribal taxes are imposed pursuant to tribal governmental authority confirmed in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Together, the oil and gas taxes, the rents, and the royalties provide the Tribe with 90% of its governmental revenues. (*See* Record ("R."), vol. I, p. 159).

Cotton also pays five unapportioned oil and gas related severance and production taxes to New Mexico. Because it pays overlapping tribal and state taxes, Cotton's total oil and gas severance tax burden is approximately 14% of value, whereas off the Reservation, producers pay taxes equal to approximately 8% of value.[2]

B. The Jicarilla Tribe and the United States are the Principal Providers of a Civilized Society on the Reservation.

Cotton operates solely on the Jicarilla Indian Reservation in the San Juan Basin portion of New Mexico, maintains 64 wells on five leases on the Reservation, and

---

[1] The first two taxes, the oil and gas severance tax and the oil and gas privilege tax were imposed prior to the trial in these proceedings. A third tax, the possessory interest tax, was enacted on October 2, 1987. The third tax appears in Appellant's Reply Brief at App. 1-19.

[2] The present tense refers to the period 1981-1985 which are the years directly involved in the Cotton tax refund appeal. Cotton sold its interests in the five leases to Apache Corporation in mid 1986, but retains the right to the tax refunds up until the date of the sale. Cotton's successor in interest now also pays the third Jicarilla Apache Tribe tax which adds approximately 2% of value to the overall Reservation oil and gas tax load.

has three full-time employees. (*See* Transcript of Proceedings ("Tr."), vol. I, pp. 35, 37, 41, 50). Cotton's operations on the Reservation are undertaken pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a. Under that Act, regulations have been issued by the Secretary which cover all aspects of the oil and gas operations, from the acquisition of leases to the development of rents, royalties, and operation responsibilities. The detailed and comprehensive federal and tribal regulatory program governs diligent development operations, protection against drainage, spacing, drilling supervision and maintenance, groundwater protection, environmental controls, and abandonment of wells. *See* 25 C.F.R. Part 211, 30 C.F.R. Parts 202 and 206, and 43 C.F.R. Part 3162. A summary of these extensive federal regulations is attached as an appendix to this Brief.

The Tribe's duty to supervise and protect oil and gas development on the Reservation not only relies on these federal statutes and regulations, but also on the organic law of the Tribe, namely the Constitution and Bylaws of the Tribe. That Constitution provides in relevant part:

> *Resource Development*. Tribal lands and natural resources may be developed for industrial or other purposes providing that such development is based on sustained yield principles wherever applicable and provided that such development is designed for the general welfare of the Tribe as a whole. The tribal council may enact ordinances to govern development of tribal lands and other resources.

(Cotton Exhibit ("Cotton Exh.") 10, p. 9, introduced and referenced throughout the testimony of Richard Lotspeich, vol. I, p. 171 to vol. II, p. 253).

Implementation of these federal and tribal responsibilities requires a significant annual allocation of federal and tribal monies and manpower. The United States, through the Bureau of Indian Affairs ("BIA") has instituted extensive real estate services on the Reservation which provide oil and gas supervisory programs, particularly in the area of surface protection, lease issuance, and royalty and rental compliance. (*See* Deposition of Harold Tecube at p. 10 ("Tecube:10"), stipulated by the parties to be a part of the record and introduced in the testimony of Richard Lotspeich, R., vol. II, p. 227). In addition, the Bureau of Land Management ("BLM") and the Minerals Management Service ("MMS") provide comprehensive oil and gas services regulating virtually every step of Cotton's drilling and plugging operations. (Tr., vol. I, p. 44). Together the BIA and BLM during the five years at issue incurred $1,206,800 in support of oil and gas related activities on the Reservation. (Cotton Exhs. 6 and 13, p. 9).

At the same time, the Tribe has its own oil and gas administration program which during the five years at issue expended $736,358 in comprehensive oil and gas services. (Cotton Exh. 11). The Tribe independently employs an oil and gas administrator and two persons who work in the tribal oil and gas department. Together they assure financial compliance by non-Indian lessees and joint venturers. Moreover, they enforce the tribal environmental ordinance dealing with oil and gas surface issues as well as the tribal tax ordinances. (Tecube:9,10).

Under the comprehensive federal regulatory scheme, Cotton must obtain the consent of the Tribe, the BIA and the BLM to acquire and develop oil and gas wells on the

Reservation. (Tr., vol. I, p. 40). Archaeological surveys are required, again under the supervision of the BLM and the Tribe. (Tr., vol. I, pp. 40-41). After the initial site investigation, a tribal archaeological investigation is undertaken, and drilling applications must be submitted to the BLM. (Tr., vol. I, pp. 42-43). Drilling operations also require the consent of the Tribe. While under federal law the BLM and the MMS have the primary responsibility for actual drilling, production operations, well safety, and royalty compliance, the BIA working with the BLM has the primary surface management responsibility for all oil and gas matters as well as compliance inspections. (Tr., vol. I, p. 44). In addition, when wells are abandoned and plugged, it is the BLM which exercises the required enforcement duties (Tecube:4; Tr., vol. I, p. 49) and in the event of an oil spill, theft or other unusual event, the BIA, the Tribe, the BLM and where appropriate, the Environmental Protection Agency ("EPA") work together to supervise and provide the necessary enforcement. (Tr., vol. I, pp. 47-48).

New Mexico's responsibilities which touch directly on Cotton's Reservation oil and gas operations are limited to confirming that tribal oil well spacing requirements are consistent with state standards, and to recording the oil and gas purchasers of the Reservation oil and gas production. (Tr., vol. I, p. 46). During the five years in question, none of Cotton's employees have seen any New Mexico oil and gas supervisors or enforcement personnel on the Reservation (Tr., vol. I, p. 45) and no state police or other state officials have ever been seen at the Cotton lease area. (Tr., vol. I, p. 48).

C. New Mexico's Responsibilities to Cotton are Limited to Providing Highway Access to the Jicarilla Reservation.

During the five years in question, Cotton paid New Mexico and its subdivisions $2,293,953 in oil and gas severance and production taxes alone. (Cotton Exh. 13, p. 1). Of Cotton's three full-time employees, one is a superintendent who lives in Farmington and two are pumpers who live near the Reservation in the small town of Lindrith, New Mexico. (Tr., vol. I, p. 35). The superintendent utilizes U.S. Highway 64 from Farmington to Bloomfield, travels south on State Highway 44 to State Highway 537, and then uses State Highway 537 proceeding north to the Reservation. The pumpers utilize J. 19 which is an Indian road maintained by the oil companies and which provides transportation between the Reservation and Lindrith. (Tr., vol. I, p. 35). The superintendent goes to the lease area three or four times a week to check operations and the pumpers check the wells on a daily basis. (Tr., vol. I, p. 53).

The three Cotton employees live off the Reservation and have families who live off the Reservation. The families each pay normal state taxes such as property taxes, and gross proceeds taxes and enjoy the benefits of New Mexico as the provider of a civilized society. (Tr., vol. I, p. 52). In addition, Cotton as a corporate taxpayer pays a New Mexico franchise tax, a state property tax, a state income tax, state gross receipts taxes, and gasoline taxes, as well as the five taxes specifically related to oil and gas production. (Tr., vol. I, pp. 97-98).

The primary state services which Cotton utilizes do not arise from the business activities of its three full-time

employees, but rather they arise as a result of Cotton's ongoing involvement with a number of independent contractors who service Cotton's Reservation operations and who for the most part live in the Farmington area and operate on and off the Reservation. (Tr., vol. I, pp. 52-55). Oil and gas service companies who maintain Cotton's wells all utilize Highways 44 and 537 and come to the Reservation on a variety of schedules, some twice a month and others three or four times a year. (Tr., vol. I, p. 54). Perhaps the most substantial users of state highways are the trucks which acquire Cotton's oil at the wells and deliver the oil off the Reservation up to 50 times a month to the off-Reservation refineries of Giant and Conoco, two interstate refining companies. (Tr., vol. I, pp. 54-56). The gas produced by the Cotton wells is transported off the Reservation via a local pipeline to the main distribution pipeline of Northwest Pipeline Company, an interstate pipeline company. (Tr., vol. I, p. 57). The Cotton employees and contractors not only utilize New Mexico highways, but also benefit to a lesser extent by the presence of state and local police protection on the highways described above.

However, when it comes to on-Reservation services and infrastructure (as opposed to providing highway access to the Reservation), New Mexico's responsibilities to Cotton in particular and to the Reservation residents in general are minimal. For example, no state court system expenditures occur on the Reservation, no state parks are located on the Reservation, and no state fish and game services are provided on the Reservation. (Tr., vol. II, p. 394). Further, no state water and sewage process projects (Tr., vol. I, pp. 123-24), no state fire protection (Tr., vol. II, p. 393) and no state public health facilities (Tr., vol. I, pp.

127-28) are found on the Reservation. Significantly, no state oil and gas severance tax monies have been used for Reservation schools, Reservation water and sewer projects, buildings, hospitals, or state university educational facilities on the Reservation, although state severance tax monies are frequently used to support such facilities located elsewhere throughout New Mexico. (Tr., vol. II, pp. 241-42, 280-81).

D. The New Mexico Statutes.

New Mexico imposes five oil and gas severance and production taxes on Cotton's operations on the Reservation in the very same fashion that New Mexico imposes those taxes on off-Reservation operators. The largest of the New Mexico taxes is the oil and gas severance tax, N.M. Stat. Ann. §§ 7-29-4 *et seq*. The New Mexico privilege tax or emergency school tax, N.M. Stat. Ann. §§ 7-31-4 *et seq*. is a second significant tax imposed on the privilege of severing oil and gas in New Mexico. The severance tax is utilized primarily to finance specific capital projects located throughout New Mexico, and the privilege tax provides supplemental monies for the state general fund. Three smaller taxes are also imposed. They are the oil and gas conservation tax, designed to provide financial support for the New Mexico Oil and Gas Tax Commission, N.M. Stat. Ann. §§ 7-30-4 *et seq.;* the New Mexico ad valorem production tax, N.M. Stat. Ann. §§ 7-32-4 *et seq.*, which is a property tax imposed on the assessed value of oil and gas production; and the New Mexico ad valorem equipment tax, N.M. Stat. Ann. §§ 7-34-4 *et seq.*, which is a property tax levied on the value of the oil and gas equipment at each production unit. The two New Mexico property taxes provide support for county and local school services.[3]

E. The Proceedings Below.

Cotton filed this lawsuit against the State of New Mexico seeking a refund of taxes paid under protest. In addition to seeking a return of tax monies collected from its Reservation activities, Cotton also sought an order enjoining the unlawful collection of the taxes. (Cotton Amended Complaint, J.A. at 2-15). A trial was held before the Honorable Judge Bruce E. Kaufman, District Court, District of Santa Fe on November 3-6, 1985. The trial court found that New Mexico's taxes were lawful, concluding that the state taxes had not been preempted by applicable federal law, specifically the Indian Mineral Leasing Act of 1938, and that the New Mexico taxes do not violate the Commerce Clause. (J.S. at App. 17-18). The court reasoned that because New Mexico provides the benefits of an organized civilized society for all of the state's citizens, including non-Indian business partners of the Tribe operating on the Reservation, New Mexico is entitled to impose its five oil and gas taxes without allocation or apportionment. (J.S. at App. 14-19).

Cotton appealed to the New Mexico Court of Appeals, which affirmed the district court's decision. The

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[3] Four out of five of the New Mexico taxes and the three Jicarilla tribal taxes are each measured by the quantity and value of Cotton's Reservation oil and gas production. One of New Mexico's property taxes, a small tax imposed on the value of the oil and gas equipment used at the well site, the New Mexico ad valorem equipment tax, N.M. Stat. Ann. §§ 7-34-4 *et seq.*, is not valued on the basis of production.

court of appeals found no federal preemption, noting that Cotton, not the Tribe, pays the taxes in question and that Cotton failed to show that the five taxes significantly interfered with the Tribe's economic development or sovereignty. (J.S. at App. 11). The New Mexico Court of Appeals also ruled that this Court's Commerce Clause holding in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), required that New Mexico's full taxing authority be upheld, because Cotton's oil and gas production, like the coal production at issue in *Commonwealth*, is located entirely within one state. (J.S. at App. 8). The court of appeals rejected the contention that taxation of the Cotton operation by the Tribe should be treated as if it were equivalent to a second state's taxation for purposes of apportioning or allocating New Mexico's taxes, under the Commerce Clause. (J.S. at App. 8). Cotton's Petition for a Writ of Certiorari to the New Mexico Supreme Court was granted on November 3, 1987, and then quashed on November 10, 1987.[4]

[4] Cotton presented both its federal preemption and Commerce Clause claims before the New Mexico courts recognizing that under the traditional Commerce Clause analysis, controlling acts of Congress must be analyzed to determine whether a dormant Commerce Clause claim can be reached. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 454 (1979). While those claims are separately stated in this Brief and in Cotton's complaint for a refund of taxes, argument of the two claims was combined before the New Mexico appellate courts in recognition that this Court's invitation to challenge New Mexico's taxes (*Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 158 n.26 (1982)) interrelated the two claims.

SUMMARY OF ARGUMENT

1. This case presents the Court with an opportunity to consider the application of two provisions of the Commerce Clause, as they relate to preserving the principal economic activity on the Jicarilla Reservation – namely the extraction and sale of the Jicarilla Apache Tribe's oil and gas reserves held in trust by the United States. The Court has frequently looked to the Indian Commerce Clause and federal laws adopted pursuant to its mandate to protect historically fragile reservation economies from intrusive state taxes. Absent a specific showing of a substantial state interest, the Court has relied upon the presence of a comprehensive federal statutory and regulatory scheme attaching to a reservation economic venture, together with evidence of actual federal and tribal governmental participation, to preempt state tax laws which attempt to generate statewide revenues from reservation commerce.

2. The oil and gas reserves extracted by Cotton are held in trust by the United States pursuant to the Executive Order of February 11, 1887, 1 C. Kappler, Indian Affairs, Laws and Treaties 875 (1904). They are produced under the authority of the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a and comprehensive federal regulations. *See* 25 C.F.R. Part 211, 30 C.F.R. Parts 202 and 206, and 43 C.F.R. Part 3162. New Mexico cannot justify the continuing imposition of its five taxes, for Cotton is decidedly not a recipient of those state services required to sustain the New Mexico taxes. As noted by the court below, Cotton demonstrated, and New Mexico does not seriously dispute, that during the five years in question, New Mexico and its local subdivisions provided Cotton

approximately $89,384 in services while deriving tax revenues from Cotton's Reservation operations in the amount of $2,293,953. On a Reservation-wide basis during the very same five years, Cotton's economic evidence shows, and New Mexico does not seriously dispute, that New Mexico and its subdivisions provided the Reservation in its entirety services and infrastructure in the amount of $10,704,748, and in exchange received $47,483,306 in oil and gas tax revenues.

3. Jicarilla Reservation economic development activities are insulated by an historic immunity from state and local control. *See Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973). In regulating commerce on the reservations, the tribes retain all aspects of their historical sovereignty not "inconsistent with the overriding interests of the National Government", *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 153 (1980), including the power to tax non-Indian oil and gas lessee operators when necessary to raise revenues to support essential tribal governmental services. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 136-37 (1982). Because New Mexico's responsibility for providing essential governmental services to the Jicarilla Reservation is minimal, particularly when Cotton's oil and gas operations are examined in detail, New Mexico's five taxes are preempted by the comprehensive federal and tribal oil and gas program now in place on the Jicarilla Reservation. *See, e.g., Crow Tribe of Indians v. Montana,* 819 F.2d 895 (9th Cir. 1987), *aff'd,* 56 U.S.L.W. 3450 (U.S. Jan. 12, 1988); *California v. Cabazon Band of Mission Indians,* 107 S. Ct. 1083, 1092 n.19 (1987); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983); *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980).

4. In off-Reservation commerce among the states, the Court has ruled that the Commerce Clause operates to preserve a national common market for the benefit of the citizens of all states, and that such national commerce (including western energy development) must be free of multiple and discriminatory state tax burdens. Taxation by the Jicarilla Tribe should be treated as the equivalent of state taxation for purposes of determining whether under the Commerce Clause, New Mexico's imposition of severance and production taxes on an activity local to the Jicarilla Indian Reservation is unlawful.

5. Under the Court's governing dormant Commerce Clause precedent, the five New Mexico oil and gas severance and production taxes are unlawful. First, the Jicarilla Apache Tribe has the exclusive right to impose severance taxes upon the local activity of extracting oil and gas reserves held in trust by the United States for the benefit of the Jicarilla Indians. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981). Second, New Mexico's taxes must be apportioned to reflect that the United States and the Jicarilla Apache Tribe provide 90% of the services required for Cotton's operations on the Jicarilla Apache Reservation. *See Standard Oil Co. v. Peck,* 342 U.S. 382 (1952); *Hans Rees' Sons v. North Carolina,* 283 U.S. 123 (1931). Third, the New Mexico taxes unlawfully discriminate against Cotton's on-Reservation operations by favoring oil and gas producers operating off the Jicarilla

Reservation. *See New Energy Co. v. Limbach*, 56 U.S.L.W. 4475 (U.S. May 31, 1988); *American Trucking Associations v. Scheiner*, 107 S. Ct. 2829 (1987); *Maryland v. Louisiana*, 451 U.S. 750 (1981).

ARGUMENT

I. NEW MEXICO TAXES ARE PREEMPTED BY THE FEDERAL LAWS AND POLICIES WHICH PROTECT TRIBAL SELF-GOVERNMENT AND STRENGTHEN IMPOVERISHED RESERVATION ECONOMIES.

A. Summary of Governing Principles.

The Court has previously confirmed that pursuant to the Indian Commerce Clause, Congress has frequently acted to strengthen and solidify historically fragile reservation economies. For example, the Court held that the leasing of reservation oil and gas resources pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a is designed to maximize revenues for tribes and to provide tribes with uniformity of regulation and control of what is frequently their most valuable resource. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985). Moreover, the Court recently held that Congress' enactment of the Indian Self-Determination and Education Assistance Act and the Indian Finance Act, 25 U.S.C. §§ 450 *et seq.* and 1451 *et seq.* (supplementing authority previously secured the tribes in the federal acts establishing the reservations and in the Indian Reorganization Act, 25 U.S.C. §§ 476 *et seq.*) is designed to permit Indian reservations to develop economies which are "comparable" to neighboring non-Indian economies. *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083, 1092 n.19 (1987).

Further, the Court has confirmed the important federal policy of encouraging tribal taxation in order to finance necessary tribal governmental services, in recognition of the emerging role of tribes as providers of a civilized society on the reservations. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion* the Court stated:

> The petitioners [oil and gas producers] avail themselves of the 'substantial privilege of carrying on business' on the reservation . . . . They benefit from the provision of police protection and other governmental services, as well as from 'the advantages of a civilized society' that are assured by the existence of tribal government. . . . Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of tribal government.

Id. at 137-38 (citations omitted).

The presence of these federal policies necessarily reduces the power of the states to impose taxes on the reservation.

> *[I]n the special area of state taxation*, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation . . . .

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (emphasis added). Indeed, because the primary authority and responsibility for administering the reservations lies with the federal government and the tribes, the states are left "with no duties or responsibilities" and have a reduced power to influence reservation affairs. *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 691 (1965).[5] Given the reduced responsibilities of the states, the Court no longer permits the states to tax reservation based, federally regulated activity involving important Indian property interests where the only state interest demonstrated is a general desire to raise revenues. *See Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 56 U.S.L.W. 3450 (U.S. Jan. 12, 1988) (no state interest to allow Montana to impose its severance and gross proceeds taxes to off-reservation mining of Crow tribal coal undertaken by a non-Indian lessee of the tribe); *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987) (no state interest to allow California to regulate reservation bingo games); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (no state interest to permit New Mexico to regulate reservation hunting by non-Indians); *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982) (no state interest to justify New Mexico's gross receipts tax on construction by a non-Indian of a reservation school); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (no state interest to justify Arizona's taxation of reservation timber trucks owned by non-Indians).

[5] In *Cabazon*, 107 S. Ct. at 1091 n.17, the Court concluded that the state interest in reservation taxation is "correspondingly weak" and in *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 56 U.S.L.W. 3450 (U.S. Jan. 12, 1988), the Ninth Circuit Court of Appeals concluded that Indian trust minerals are "not the state's to regulate . . . it has no . . . legitimate interest in appropriating Indian mineral wealth." *Id.* at 902 (citing *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1114 (9th Cir. 1981)).

Indeed, state taxation or regulation has only been permitted in two situations where the activities taxed (i.e., the retail sale of cigarettes and the retail sale of alcohol) were found not to be the subject of extensive federal and tribal regulation. Rather, cigarette and liquor sales were seen as commercial events historically regulated and administered by the states, having no real reservation connection and hence not truly a part of protected Indian commerce. *See Rice v. Rehner*, 463 U.S. 713 (1983); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

B. Cotton's Reservation Oil and Gas Production is Subject to Comprehensive Federal and Tribal Regulation and Management, Preempting New Mexico's Taxes.

The Cotton leases were issued by the Tribe under the authority of the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a and are administered by the Secretary and the Tribe pursuant to that Act, as well as 25 C.F.R. Part 211, 30 C.F.R. Parts 202 and 206, and 43 C.F.R. Part 3162, and relevant tribal ordinances. The United States, acting through the BIA, BLM, and MMS and in concert with the tribal oil and gas office, exercises complete and comprehensive control over Cotton's activities, including regulating and administering the acquisition of leases,

guaranteeing environmental protections over well locations, protecting natural resources during drilling, protecting tribal resources during production, plugging and abandoning of wells, monitoring of lease production, assuring royalty compliance with federal regulations and tribal ordinances, and providing virtually all governmental services to Cotton on the Reservation.[6] These federal and tribal activities implement an extensive federal oil and gas regulatory scheme which is summarized in an appendix to this Brief.

The federal and tribal regulatory program is comprehensive and substantial. During the five years at issue, the BIA and BLM expended $1,206,800 (Cotton Exhs. 6 and 13, p. 9) on oil and gas related activities on the Reservation, and during the same five years the Tribe's oil and gas program expended $736,358 (Cotton Exh. 11). In fact, the voluminous federal and tribal regulatory and management program controlling Cotton's oil and gas operations is more comprehensive than the federal and tribal regulations and policies found by the Court to

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[6] On the Jicarilla Reservation, the United States and the Jicarilla Tribe, and not New Mexico, are the principal providers of a civilized society. For example, during the years 1981-1985 Cotton's economist showed that the federal and tribal governments expended $76,943,947 for Reservation services, and New Mexico and its subdivisions expended during the same time frame $10,704,748. (Cotton Exh. 13, p.10 (revised)). One reason New Mexico's level of government services is so low on the Jicarilla Indian Reservation is because art. IV, § 31 of the New Mexico Constitution prohibits state aid to any community like a federal Indian reservation which is "not under the absolute control of the state."

preempt state taxes in five predecessor cases to be discussed below. Indeed, federal and tribal officials are required to exercise "literally daily supervision" over Cotton's oil and gas operations in a "federal regulatory scheme . . . so pervasive as to preclude the additional burdens sought to be imposed." *See Bracker*, 448 U.S. at 147-48.[7]

In contrast, New Mexico's responsibilities are significantly limited. In exchange for the individual and business taxes paid by Cotton and its employees while they are off the Reservation and in exchange for the full array of state and local taxes paid by Cotton's oil trucks, gas pipelines, and independent contractors New Mexico provides primarily off-Reservation highway and police protection services. (Tr., vol. I, pp. 49-52, 97-98). Further, with respect to on-Reservation activities, Cotton's well spacing is coordinated with the State of New Mexico and Cotton also provides New Mexico with information as to who is acquiring its oil production. (Tr., vol. I, pp. 43-46).[8]

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[7] Consistent with the comprehensive federal and tribal regulation of Cotton's oil and gas operations, it is not surprising that during the past ten years not one of the Cotton employees has ever seen a New Mexico oil and gas supervisor or policy enforcement officer on the Reservation to supervise drilling or to review oil and gas drilling operations. (Tr., vol. I, p. 45).

[8] Whatever oil and gas duties New Mexico may exercise *vis a vis* well spacing of Cotton's Reservation production is purely a result of a cooperative effort between New Mexico and the Tribe. As a matter of federal law, New Mexico has no authority to establish well spacing on the Reservation units. *See* 43 C.F.R. § 3162.3-1 which establishes well spacing for

(Continued on following page)

Hence, New Mexico has been left with virtually "no duties or responsibilities" for Cotton's severance of Jicarilla oil and gas reserves held in trust by the United States. *See Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 691 (1965).

C. The Court's Governing Principles Confirm that New Mexico's Taxes are Preempted.

As we show below, the attempt by New Mexico to impose its five oil and gas taxes on Cotton's operations closely resembles:

> (i) Arizona's unsuccessful efforts to impose its motor carrier license and use fuel taxes on a non-Indian business partner of the White Mountain Apache Tribe in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980);
>
> (ii) New Mexico's unsuccessful effort to impose its hunting and fishing regulations on non-Indian visitors to the Mescalero Apache Reservation in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983);

(Continued from previous page)

Indian lands under the approval and authority of the BIA. *See also Assiniboine and Sioux Tribes of the Fort Peck Reservation v. Montana*, 568 F. Supp. 269 (D. Mont. 1983). Apart from its contact with Cotton, New Mexico and its subdivisions provide services to Reservation Indian public school students at the Dulce School District and make available state universities and other higher education facilities to interested members of the Jicarilla Apache Tribe. But even in the public education area, New Mexico does not carry a significant Reservation burden, for the presence of substantial federal enclave funding reduces the state contribution to the Dulce public schools from a state-wide average of 69% for all schools to 16% for the Jicarilla Reservation's only public school. (Tr., vol. II, p. 232).

> (iii) New Mexico's inability to impose its gross receipts tax on non-Indian school contractors on the Navajo Reservation in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982);
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> (iv) California's failed efforts to regulate bingo games on the Mission Indian Reservation in *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987); and
>
> (v) Montana's unsuccessful effort to impose its 30% severance tax on off-reservation coal mined by a partner of the Crow Tribe in *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 56 U.S.L.W. 3450 (U.S. Jan. 12, 1988).

Each of these recent cases strongly supports the proposition that under the Court's governing principles, New Mexico may not impose its five oil and gas severance and production taxes on Cotton. The oil and gas reserves on the Jicarilla Reservation, like the timber resources at issue in *Bracker* on the White Mountain Apache Reservation, are owned by the United States for the benefit of the Reservation Indians and are to be developed as part of a federal plan to make the reservations self-sufficient, with economies "comparable" to off-reservation economies. *See Cabazon*, 107 S. Ct. at 1092 n.19.[9] In *Bracker*, Arizona attempted to impose a motor

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[9] The Reservation oil and gas operations provide the Tribe through the payment of oil and gas royalties, rents and taxes, 90% of the Tribe's total revenue. (R., vol. I, p. 159).

carrier license tax and a fuel tax on an operator's reservation activities including hauling of wood on BIA and tribal roads. After reviewing the comprehensive federal regulations relating to both the profitable development of timber harvesting and the maintenance of BIA and tribal roads, the Court concluded:

> There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.

448 U.S. at 148-49.

In a finding that is most relevant to the Cotton oil and gas operations, the Court concluded that the Arizona taxes would threaten the overriding federal objective of guaranteeing Indians that they will receive "the benefit of whatever profit [the forest] is capable of yielding . . . " *Id.* at 149 (citing 25 C.F.R. § 141.3(a)(3) (1979)).[10] In this case, New Mexico concedes that for every dollar of taxes paid by Cotton to New Mexico, a dollar is lost which could

[10] The Court has also found that the federal purpose for developing the Jicarilla oil and gas reserves is to assure that the "Indians receive the greatest return from their property." *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 767 n.5. The maximization of resource development profits is a critical component of a general federal policy of encouraging tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

otherwise be available to assure the Tribe the "greatest return" from its oil and gas reserves. (Tr., vol. III, pp. 246, 402). Further, on-Reservation and off-Reservation economic "comparability" (*Cabazon*, 107 S. Ct. at 1092 n.19) is threatened by New Mexico's taxes, for even New Mexico concedes that when given the choice an operator would choose not to undertake oil and gas exploration on the Reservation, but would rather select exploration off the Reservation where the tax level is significantly lower because it is not subject to multiple taxation. (Tr., vol. III, pp. 500-02).[11] Significantly, the overlapping New Mexico taxes have contributed to Cotton's decision not to drill new Reservation wells, aside from low risk infield wells located adjacent to its existing producing wells. (Tr., vol. I, pp. 67-68).

Arizona's unlawful interference with a federally mandated reservation economic development plan in *Bracker* occurred in the context of a state tax burden of $34,000. Surely even greater state "diminishment" occurs in the present setting, where a state oil and gas tax burden of $2,293,953 has been imposed on Cotton alone during the years at issue and a state oil and gas tax burden of $47,483,306 has been imposed on all of the Reservation oil and gas producers during the very same

[11] These findings are fully in line with *Bracker* where it was found that because the Arizona taxes *necessarily* reduced tribal revenues and diminished the profitability of the tribal enterprise for potential non-Indian contractors, Congress' principal economic development focus for the reservation would be undermined. 448 U.S. at 149. A reduction in tribal revenues would undermine the federal mandate that the tribes effectively manage and protect their own tribal resources. *Id.*

time period.[12] (Cotton Exh. 13, pp. 1,3,4 and 10 (revised)). New Mexico's taxes necessarily impact tribal revenues which are needed to permit the Tribe to work with the BIA and BLM to undertake an extensive oil and gas resource development program, including assuring that environmental intrusion is minimized, insuring that drilling operations are safely undertaken, assuring that well contamination, fires, and other accidents are promptly dealt with, and assuring that the natural environment of the Reservation is protected from damage by oil and gas development. (Tr., vol. I, pp. 42-48).

Moreover, as in the case of Arizona's non-involvement in timber harvest on the White Mountain Apache Reservation, *Bracker*, 448 U.S. at 151, New Mexico has not been able to identify regulatory responsibilities or services relating to Reservation oil and gas production which would justify its taxation. Because the five New Mexico oil and gas production taxes, like the Arizona taxes, are imposed for the purpose of compensating the state for the use of infrastructure and services which in nearly all cases are located off the Reservation, New

[12] Of course, New Mexico also collects substantial taxes from Reservation commerce and Reservation residents wholly independent of its collection of the five oil and gas severance taxes at issue here. For example, New Mexico concedes that it collected $19,229,700 in one year alone from non-oil and gas taxes off three reservations, including the Jicarilla Reservation. (Cotton Exh. 19). And Cotton's economic expert offered a formula which shows that Reservation residents paid nearly $900,000 a year in gross receipts taxes attributable to off-Reservation purchasers. (Tr., vol. II, p. 252).

Mexico cannot justify the taxation of Cotton's on-Reservation activities, particularly where the oil and gas reserves, police protection, environmental enforcement, and virtually all of the services of a civilized society are provided by the Tribe and the federal government.[13]

Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) provides another recent example of a comprehensive federal regulatory scheme which preempted state taxes. Congress and the Secretary had enacted laws and regulations relating to subcontracting agreements between Indian school organizations and non-Indian construction organizations. All aspects of the subcontracting, including the approval of architectural and engineering matters, bonding, pay scales, preferential treatment for Indian workers, and the maintenance of records for the Secretary's inspection were reviewed by

[13] The failure of New Mexico to "justify" its unabated taxation of oil and gas operations can best be seen from an examination of New Mexico oil and gas severance tax funds generated from the Reservation. During the years 1981-1985, New Mexico collected $19,187,334 in oil and gas severance tax revenues from the Reservation. Yet, New Mexico could only identify two oil and gas severance tax financed capital projects which benefited the Reservation. These were a 1979 allocation to repair State Highway 44 passing through the Reservation (estimated by Cotton's economist to cost the state $176,354 a year) and a $3,394 senior center allocation to be made beginning in 1985. (State Exh. N, Table 1). As noted above, no state severance tax monies have been allocated to build schools, water and sewer projects, hospitals, or state higher educational facilities on the Reservation, although state severance tax monies are frequently used to support such facilities located off the Reservation. (Tr., vol. II, pp. 241-42, 280-81).

the Court and found to be as comprehensive as the preemptive federal scheme in *Bracker*. *Id*. at 841.[14] Given its finding that New Mexico was not attempting to tax school construction in return for specific governmental functions it provided to the school, the Court held that the New Mexico taxes were unlawful:

> Having declined to take any responsibility for the education for these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education – a scheme which has 'left the State with no duties or no responsibilities.'

Id. at 843.[15]

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[14] In a holding relevant here, *Ramah* makes it clear that New Mexico's off-Reservation services to Cotton and its employees and contractors cannot form the state's "justification" of its taxation of the local act of severing Reservation oil and gas: "Furthermore, although the State may confer substantial benefits on Lembke [the non-Indian taxpayer] as a state contractor, we fail to see how these benefits can justify a tax imposed on the construction of school facilities *on tribal lands* pursuant to a contract between the tribal organization and the non-Indian contracting firm." 458 U.S. at 844 (emphasis in original).

[15] The Court found that New Mexico's taxes constituted a burden because they unnecessarily impeded the clearly expressed federal interest in promoting the quality and quantity of educational opportunities by "depleting the funds" available for the construction of Indian schools. 458 U.S. at 842. Further, the dissent (C.J. Rehnquist) emphasized that under *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the mere loss of funds to a Tribe is not preemptive, rather preemption is triggered by a comprehensive regulatory scheme side by side with the lack of state justification. 458 U.S. at 854.

The Court's finding of preemption has extended beyond reservation timber and school construction matters and now includes hunting, fishing and gaming, all activities structured to strengthen emerging reservation economies. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987). In *Mescalero*, the Court refused to permit New Mexico to impose state regulations on a hunting and fishing program undertaken and financed by the Tribe and the United States. In *Mescalero*, federal law was found to preempt the state, even in the absence of a comprehensive federal regulatory scheme. Rather, the Court looked to the Tribe's constitution, tribal ordinances, tribal economic development priorities, and a close working relationship with the Department of the Interior, all designed to both provide employment opportunities for members and to generate income to be used to provide tribal services. 462 U.S. at 326-29.[16] The Court ruled that New Mexico's efforts would not only threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' "overriding objective" of encouraging tribal self-government and economic development. *Id*.

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[16] The *Mescalero* hunting and fishing program has many of the same characteristics as the oil and gas development program on the Jicarilla Reservation. In both cases, tribal and federal funds are utilized, in both cases the Tribe and the federal government jointly conduct a comprehensive management program, and in both cases New Mexico is imposing laws even in the face of an undisputed finding that it has not contributed significantly to the development of the reservation activity. 462 U.S. at 336, 342.

In *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987), the Court just last term restated the need to protect reservation economic development from state regulation and taxation, unless there is demonstrated a specific state interest. At issue in *Cabazon* were profitable reservation bingo games. The bingo games were important to the Mission Indians because it constituted heir sole source of tribal income. *Id.* at 1086. Finding that no federal statute expressly prohibited the tribes from undertaking this form of economic development, the Court considered whether California's effort to restrict reservation bingo "interferes or is incompatible with federal and tribal interests reflected in federal law". *Id.* at 1092. The question of whether the California regulations were lawful depended in large part on whether they undermined Congress' "overriding goal" of encouraging self-sufficiency and economic development. *Id.*[17]

The federal goals in *Cabazon* arose as in *Mescalero* not from the presence of formal and comprehensive laws and

[17] This overriding goal was found to exist not only in a series of judicial decisions of the Court, but also in the Indian Finance Act of 1974, 25 U.S.C. §§ 1451 *et seq.* and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* With respect to the later act, Congress noted that "it is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts *comparable* to that enjoyed by non-Indians in neighboring communities." 25 U.S.C. § 1451 (emphasis added).

regulations, but rather from sustained federal policy priorities. The Secretary of the Interior had made grants and guaranteed loans for constructing bingo facilities on the reservation, had approved tribal ordinances establishing and regulating gaming activities, and had reviewed the sufficiency and adequacy of tribal bingo management contracts. The Secretary's support of gaming was given great weight: "Given the often limited resources which tribes have for revenue-producing activities, it is believed that this kind of revenue-producing possibility [bingo] should be protected and enhanced." 107 S. Ct. at 1093 n.21. The Court emphasized that the federal commitment to bingo on the Cabazon Reservation was founded on the fact that no natural resources on that reservation could be exploited and that self-determination and economic development would not be within the reach of the tribe if it could not raise revenues and provide employment for its members from any lawful activity, including bingo. In this regard, the Court refused to distinguish between the management of reservation hunting and fishing resources involved in *Mescalero* and the bingo operations in *Cabazon*, believing that in both cases the true value of the activity had been generated on the reservation by activities in which the tribes had a significant interest. 107 S. Ct. at 1094.[18]

[18] In drawing this connection between bingo operations and traditional reservation land and wildlife resources, the Court distinguished the sale of cigarettes sold at tribal smoke shops at issue in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). In *Confederated Tribes*,

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To conclude, Cotton's oil and gas operations are subject to perhaps the most complete federal and tribal regulation and control of any of the examples of Indian commerce recently examined by the Court. Because New Mexico can point to no justification for its five taxes other than the general desire to raise revenues, the Court should find the New Mexico taxes preempted.[19]

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the Tribes were "merely importing a product onto the reservations for immediate resale to non-Indians" whereas in *Cabazon*, the tribes had built modern facilities, created recreational opportunities, and had undertaken concentrated ancillary services so as to allow reservation tourists to spend extended periods of time enjoying the services the tribes provide. 107 S. Ct. at 1093-94. These recreational facilities were found by the Court to be similar to the resort complex featuring hunting and fishing involved in *Mescalero* and decidedly different from the simple smoke shops examined in *Confederated Tribes*. Finally, and this is of particular significance to this case, no legitimate state interest surfaced to affirmatively justify California's laws. California's only articulated interest was that it was trying to prevent organized crime. The Court found no evidence of any criminal involvement on the Cabazon Reservation and noted that the United States had ample authority to forbid Indian bingo and card game enterprises but that current federal policy supports the tribal gaming businesses.

[19] An unresolved question surrounding the preemption of state taxes need not be examined in this appeal, namely whether in the absence of express congressional enactment, the Indian Commerce Clause of its own weight protects the tribes from intrusive state regulation. The Court as recently as *Ramah*, 458 U.S. at 845-46 has declined to adopt a constitutional doctrine that on-reservation activities are presumptively beyond the reach of state law even in the absence of comprehensive

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II. NEW MEXICO'S TAXES ARE UNLAWFUL UNDER THE COMMERCE CLAUSE.

A. Introduction.

New Mexico's oil and gas taxes imposed on Cotton's Jicarilla Reservation operations are not only unlawful because they are preempted by federal oil and gas laws and regulations. Wholly independent of that claim premised on federal laws enacted pursuant to Congress' power over Indian commerce, Cotton asserts that New Mexico's taxes (insofar as they are imposed without allocation or apportionment on top of Jicarilla Apache tribal taxes) constitute an unlawful multiple tax burden on interstate commerce under the dormant Commerce Clause. This part of our Brief will address Commerce Clause issues, including the question specified by the Court in its order of April 18, 1988 – namely, does the Commerce Clause require that the Jicarilla Apache Tribe be treated as a state for purposes of determining whether New Mexico's taxes should be apportioned to account for the presence of the tribal taxes. (J.A. at 20).

A preliminary question should be addressed. As the Court has frequently stated, the inquiry whether the

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federal regulation. While not eliminating this approach, the Court indicated its continuing satisfaction with relying on the presence of federal statutory and regulatory pronouncements, although it acknowledged that they are to be construed "generously" in order to comport with traditional notions of Indian sovereignty and with the federal policy of encouraging tribal independence. *Id.* at 846 (quoting *Bracker*, 448 U.S. at 144).

dormant Commerce Clause affords some protection from state legislation which is inimical to the national commerce only arises in the absence of governing acts of Congress. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). When this premise is applied to the Court's Indian law decisions, there is some uncertainty. In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481 n.17 (1976), the Court indicated that Indian country governance depends entirely on federal statutes and treaties under the Supremacy Clause. Under this view, the preemption analysis found in Part I of this Brief, premised on what we believe are controlling acts of Congress, represents the exclusive path for determining whether New Mexico's five oil and gas taxes are lawful.

However, the Court has also held that tribal sovereignty as well as the protection from state laws accorded that sovereignty is not dependent on acts of Congress, but rather enjoys an independent origin. For example, the Court has stated "[t]he powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished.*' " *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original)). Then in *Bracker*, 448 U.S. at 142-43 the Court stated:

> This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. . . . Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them'. . . .The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.

Moreover, the Court has expressly held that the power of the Jicarilla Apache Tribe to impose its taxes on Cotton is "an inherent power necessary to tribal self-government and territorial management". *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). These latter authorities indicate that the dormant Commerce Clause doctrine is available to test the legality of state taxes, if in fact the statutes analyzed in Part I do not control.

B. Application of the Dormant Commerce Clause to New Mexico and the Jicarilla Apache Tribe.

The "negative" aspect of the Commerce Clause protects a national common market. Multiple state tax burdens on interstate commerce interfere with such national commerce. They favor the internal commerce of each state over interstate commerce, bulkanizing the United States into separate trading sovereignties. The Court has required that the power to tax either be allocated to one jurisdiction, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), or apportioned among those jurisdictions that can justify the right to tax. *See* Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43 (1988). The Jicarilla tribal and New Mexico state taxes imposed on Cotton have the same impact on the interstate flow of oil and gas as multiple taxes imposed by two neighboring states.[20] The overlapping tribal and state taxes harm consumers and importing states in the very same way. As a

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[20] Nearly all of the oil and gas produced on the Jicarilla Indian Reservation, including Cotton's production, is shipped interstate. *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 539 (10th Cir. 1980); Cotton Exh. 20; State Exh. 1.

result, we submit that the Tribe's taxes must be taken into account as the equivalent of state taxes in determining whether New Mexico's overlapping taxes of a local Reservation activity violate the Commerce Clause.[21]

Very simply stated, it does not matter to Cotton and it does not matter to the states and their citizens who consume Jicarilla Reservation oil and gas, whether a multiple tax burden is created by two independent state governments or by a tribe and a state. In both cases, the national flow of commerce is burdened, and Cotton as the taxpayer, as well as the residents of the consuming states, are impermissibly prejudiced by taxation not justified by

[21] We do not have to determine in this case whether the Jicarilla Tribe should be treated as a state for other purposes. On one hand, while the reservations are owned in trust by the United States and are free from most of the generally applicable state laws, the reservations have not been typically treated as states in a territorial sense. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). On the other hand, treating the Jicarilla Reservation as a state for purposes of analyzing multiple taxes on interstate commerce appears to be wholly consistent with the Court's increasing recognition of tribal governmental taxing powers, and with recent congressional priorities. Thus, in the Internal Revenue Code, 26 U.S.C. § 7871, Congress listed a series of instances where Indian tribal governments are treated as states under the Internal Revenue Code. Similarly, in the environmental area, Congress has recently given the Tribes coequal status with the states. *See, e.g.*, 42 U.S.C. § 9604(d)(1) (Comprehensive Environmental Response Compensation and Liability Act).

the taxing government's [here New Mexico] limited interest in the flow of Reservation oil and gas.[22]

C. New Mexico's Taxes Constitute an Unlawful Multiple Burden on Interstate Commerce.

Under the dormant Commerce Clause and the Due Process Clause, only the government possessing the requisite territorial nexus to the local interstate commerce activity – here oil and gas drilling on Indian trust lands – may tax. As the Court held in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), in examining the lawfulness of Montana's 30% severance tax, there can exist no multiple taxation of such a local activity as mining for "the severance can occur in no other state" and "no other state can tax the severance". *Id.* at 617.[23] The same conclusion, that under the dormant Commerce Clause only the Jicarilla Tribe may tax the severance of oil and gas taken from reservation lands held in trust by the United States for the benefit of the Jicarilla Indians has already been acknowledged in *Merrion*, 455 U.S. at 158 n.26, where the Court stated: "[T]here can be no claim that the Tribe seeks to tax any more of petitioners' mining activity than the portion occurring within tribal jurisdiction."

[22] As the Court recently observed, the dormant Commerce Clause prohibits economic protectionism in part because such protectionism typically imposes an "economic disadvantage" upon interstate commerce. *New Energy Co. v. Limbach*, 56 U.S.L.W. 4475, 4476 (U.S. May 31, 1988).

[23] Moreover, the Court has acknowledged the local property tax character of severance taxes: "[i]n many respects, a severance tax is like a real property tax . . . " *Commonwealth Edison Co.*, 453 U.S. at 624.

On other occasions, the Court has relied both on the Commerce Clause and the Due Process Clause of the Fourteenth Amendment to allocate taxing power between states so as to protect interstate commerce from taxation which bears no relationship to the services or benefits provided. *See* Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 85-98 (1988). For example, in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the Court upheld New Mexico's unapportioned gross receipts tax laid on the privilege of selling magazine advertising for a magazine having interstate circulation:

> The tax is not one which in form or substance can be repeated by other states . . . [R]eceipts from subscriptions are not included in the measure of the tax. It is not measured by the extent of the circulation of the magazine interstate. All the events upon which the tax is conditioned – the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it – occur in New Mexico and not elsewhere.

Id. at 260. Then in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) the Court refused to allow Illinois to impose its use taxes upon an out-of-state seller of goods whose only connection with Illinois customers was its use of a common carrier of the United States mail. The interstate taxpayer in *National Bellas Hess, Inc.*, was protected from Illinois taxation because that state demonstrated "no legitimate claim to impose 'a fair share of the cost of the local government' [on National Bellas Hess]". *Id.* at 759-60. These cases support the conclusion that only the Jicarilla Apache Tribe may tax the local activity of producing and selling Reservation oil and gas reserves held in trust by the United States for the benefit of the Jicarilla Indians.

Moreover, while New Mexico has the right to exact from interstate commerce its fair share of the cost of its state government, New Mexico may not "unfairly burden . . . commerce by exacting more than a just share from the interstate activity". *See Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978). That is, New Mexico must "justify" the imposition of its five oil and gas extraction taxes. *See Freeman v. Hewit*, 329 U.S. 249, 253 (1946).[24]

In a variety of circumstances, the Court has confirmed that discriminatory taxation occurs when a "rational relationship between the income attributed to the State and the intrastate values of the enterprise . . . " no longer exists. *See Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207, 219-20 (1980). In *Hans Rees' Sons v. North Carolina*, 283 U.S. 123, 134 (1931) the Court concluded in the context of income taxation of interstate commerce:

> When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method, which, albeit fair on its face, operates so as to reach profits which

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[24] In *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952), the Court struck down as unjustified Ohio's unapportioned property taxes imposed on Ohio River vessels which stopped in Ohio only for occasional fuel or repairs, observing that the Ohio taxes *"have no relation to the opportunities, benefits, or protections which the taxing state gives those operations."* *Id.* at 384-85 (emphasis added).

are in no just sense attributable to transactions within its jurisdiction.[25]

Very simply, New Mexico's five unapportioned oil and gas taxes do not bear a rational relationship to New Mexico's values associated with Cotton's Jicarilla Reservation activities.[26] Nor has New Mexico demonstrated that it may look beyond its borders in order to obtain the true value of the activities undertaken within New Mexico. *See Norfolk & Western Railway Co. v. Missouri State Tax*

[25] A practical effect inquiry in *Hans Rees' Sons* demonstrated that while the taxpayer's income having its source within the taxing state was 17%, North Carolina allocated approximately 80% of the taxpayer's income to itself. As a result, the Court concluded that the tax burden was "out of all appropriate proportion to the business transacted by the appellant in that State. In this view, the taxes as laid were beyond the State's authority." *Hans Rees' Sons v. North Carolina*, 283 U.S. at 135-36.

[26] While the Cotton and New Mexico economists did not agree dollar for dollar as to the precise amount of New Mexico's contribution to Jicarilla Reservation oil and gas activities, New Mexico does not dispute the presence of overwhelming evidence which shows that its five oil and gas taxes generate revenues which are substantially in excess of its services. For example, Cotton's evidence showed that with respect to the Cotton operations during the years 1981-1985, New Mexico and its subdivisions provided services to Cotton and its contractors in an amount calculated to be $89,384 and collected oil and gas severance taxes from Cotton in the amount of $2,293,953. At the same time on a Reservation-wide basis during the period 1981-1985, New Mexico and its subdivisions provided total government services in an amount calculated to be $10,704,748 while extracting revenues from Reservation oil and gas production in the amount of $47,483,306. (Cotton Exh. 13, pp. 1,3,4,10 (revised)).

Commission, 390 U.S. 317, 325 (1968). That is, New Mexico has not demonstrated that it must take into account the value of the severance activity on the Jicarilla Reservation in order to truly reflect New Mexico's off-Reservation services provided Cotton. The Court's decision in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) vividly demonstrates the error of New Mexico's ways. There, the Court confirmed that no state may build up its domestic commerce by means of "unequal and oppressive burdens upon the industry and business of other States". *Id.* at 335 (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)). In a similar way here, New Mexico is favoring off-Reservation oil and gas production and unfairly burdening Cotton's on-Reservation production. In fact, New Mexico is exploiting Cotton's limited use of state highways (for which Cotton, its employees and contractors pay taxes independent of the five production taxes at issue) to unfairly extract the full array of New Mexico severance taxes on a Reservation activity previously taxed and effectively beyond the scope of state responsibility.[27]

[27] In the setting of Indian reservations in New Mexico, the Court has already held that one reason New Mexico's laws should not be permitted to intrude is that they are based on "considerations not necessarily relevant to and possibly hostile to the needs of the reservation." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983). New Mexico's exploitation of the Jicarilla Reservation is perhaps best seen by the undisputed fact that during the five years at issue, New Mexico derived $19,187,334 from just Jicarilla Reservation oil and gas severance tax revenues, utilized those funds on a statewide basis to help school construction in 51 school districts, and yet elected not to return any severance tax funds for school construction on the Jicarilla Reservation. (Tr., vol. II, pp. 241-42.)

Furthermore, New Mexico's refusal to apportion or allocate has resulted in "gross overreaching, beyond the values represented by the intrastate assets purported to be taxed . . . ". *See Norfolk & Western Railway Co. v. Missouri State Tax Commission*, 390 U.S. 317, 326 (1968). In *Norfolk*, Missouri's tax was levied on 8.2% of the taxpayer's rolling stock but the taxpayer demonstrated that in fact its intrastate rolling stock equaled only 2.71% of its total property. The problem with Missouri's gross discrepancy in *Norfolk* and New Mexico's overreaching here is that inevitably they result in state taxation of property or income located out of the state. *Id.* at 327.[28]

Application of these principles to the Cotton tribal lease operations suggests that the five New Mexico taxes must be substantially reduced.[29] Cotton's evidence shows

[28] New Mexico taxes Cotton, knowing full well that Cotton's production is subject to tribal taxation causing a "resultant tax burden higher than the taxpayer would incur if its business were limited to any one jurisdiction." *See Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 170-71 (1983).

[29] While we address here the apportionment concepts as directed by the Court, we continue to resist the notion that *these* five extraction taxes – each imposed on the privilege of engaging in oil and gas production within New Mexico – somehow give New Mexico any right to directly tax oil and gas held in trust by the United States for the benefit of the Jicarilla Indians and its commercial partners doing business on the Jicarilla Reservation. *See Merrion*, 455 U.S. at 158 n.26. Indeed, the Court ruled in *Ramah*, that New Mexico could not impose its gross receipts tax enacted for the privilege of engaging in New Mexico business on the local activity of building a Navajo Reservation school because "New Mexico has not explained

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that significant federal and tribal governmental services placed on the Jicarilla Indian Reservation provide 90% of the services and infrastructure used by the Indians and their non-Indian commercial partners. Hence, New Mexico's taxes, if any, imposed on the severance of mineral resources held in trust by the United States and located on the Jicarilla Reservation must reflect its limited responsibility to the Reservation or else New Mexico will tax value located beyond its borders.

D. The New Mexico Taxes Discriminate Against Interstate Commerce.

The New Mexico taxes discriminate against on-Reservation producers as opposed to off-Reservation producers. New Mexico's effort to tax Jicarilla Reservation production is not unlike Louisiana's attempt in *Maryland v. Louisiana*, 451 U.S. 725 (1981) to use a so-called first use tax to impose on federal off-shore production, taxes in lieu of a conventional state severance tax, which Louisiana was not empowered to impose on the federally owned minerals situated beyond its boundary. In finding the Louisiana tax discriminatory, the Court concluded that the obvious effect of the first use tax and a related severance tax credit was to impermissibly favor natural gas production within Louisiana over the development of federal off-shore production.

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the source of its power to levy such a tax in this case where the 'privilege of doing business' on an Indian reservation is exclusively bestowed by the Federal Government." 458 U.S. at 844.

Similarly, New Mexico's taxes discriminate against Jicarilla Reservation producers because its five taxes, like the Pennsylvania flat tax involved in *American Trucking Associations v. Scheiner*, 107 S. Ct. 2829 (1987), have an unlawful practical effect:

> In practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory.

Id. at 2841.[30] The Court found that Pennsylvania's discrimination favors local businesses over out-of-state businesses for no other reason than the location of the business, and found that Pennsylvania's taxes exert an "inexorable hydraulic pressure on interstate businesses to ply their trade within the State" rather than among the several states. *Id.* at 2842. Finally, the New Mexico taxes when imposed on top of the three Jicarilla taxes benefit in-state economic interests by burdening out-of-state, on-Reservation competitors. *See New Energy Co. v. Limbach*, 56 U.S.L.W. 4475, 4476 (U.S. May 31, 1988). The discriminatory treatment is revealed because of a substantial "economic disadvantage" which is imposed on out-of-

[30] A "practical effect" analysis of New Mexico's five taxes shows they are "plainly discriminatory". The taxes are imposed at one uniform level on off-Reservation producers (which utilize *all* the benefits of a civilized society provided by New Mexico) and on Cotton (which as an on-Reservation producer utilized only $89,384 in state services while paying oil and gas taxes of $2,293,953 during the five years at issue). (*See* Cotton Exh. 13, pp. 1,3,4,10 (revised)).

state producers such as Cotton who elect to become business partners with the Jicarilla Tribe.[31]

E. Remedies.

Based on the Court's governing principles, summarized above, we suggest there exist three alternative ways in which the dormant Commerce Clause applies to limit New Mexico's five oil and gas severance taxes.

(i) Allocation of exclusive taxing power to the Jicarilla Apache Tribe.

We believe the preferred remedy is a holding by the Court that under the rulings in *Commonwealth Edison Co.* and *Merrion*, the Jicarilla Apache Tribe has the exclusive authority to impose severance and production taxes on the local activity of producing Reservation oil and gas held in trust by the United States for the benefit of the Jicarilla Indians.

(ii) Utilizing a state tax credit to protect the free flow of national commerce.

A second remedy is for the Court to require New Mexico to treat payment of tribal taxes by Cotton as a credit against payment of New Mexico taxes, in recognition of the primary taxing power of the Jicarilla Tribe

[31] The economic disadvantage to Cotton is substantial. When the Jicarilla taxes are imposed in addition to the five New Mexico taxes, Cotton is required to pay in excess of a 75% penalty for operating on the Jicarilla Reservation. As the dissent noted in *Armco Inc. v. Hardesty*, 467 U.S. 638, 647 (1984) (quoting *Halliburton Oil Well Co. v. Reilly*, 373 U.S. 64, 70 (1963)) "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions".

over the extraction of Reservation oil and gas reserves held in trust by the United States for the benefit of the Jicarilla Indians. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court considered the utilization of a credit against the state cigarette tax liability of reservation cigarette purchasers subject to a lawfully enacted tribal tax. *Id.* at 157-58. However, because the Court found no comprehensive federal scheme promoting the sale of cigarettes as Indian commerce and no indication that the cigarettes reflected value generated by the reservation, the utilization of a credit was found to be inappropriate. However, in the present setting it is apparent that the activity which New Mexico seeks to tax is central to a federal plan for strengthening of the economy of the Jicarilla Reservation.[32] Here, the utilization of a credit could serve to carry forward the Court's mandate in *Merrion* that the Jicarilla Tribe, as the principal provider of a civilized society, generate tax revenues required to support necessary governmental services. 455 U.S. at 137-38. Moreover, use of a credit would remove the present penalty in excess of 75% now imposed upon Cotton and other Reservation producers. Further, to the extent that the tribal taxes do not exceed the level of off-Reservation state taxes imposed on oil and gas production, a credit could

[32] Indeed the Court noted in *Merrion* that 69% of the reservation lands were leased for oil and gas purposes. 455 U.S. at 135. Further, as noted above, the record here demonstrates that 90% of the tribal income is from oil and gas activities. (R., vol. I, p. 159).

also permit New Mexico to generate an appropriate level of revenues from Reservation oil and gas production which would accurately reflect the state's modest contribution to Cotton's operations. Most importantly, the utilization of a credit would assure that the national flow of oil and gas in interstate commerce would not be discriminated against and would not be the subject of multiple taxation favoring local commerce.

(iii) Apportionment of New Mexico's taxes to account for the state's reduced government responsibility to Cotton.

A third remedy is to utilize the Court's teachings as they relate to apportionment and to rule that New Mexico's taxes should be apportioned to reflect that the United States and the Jicarilla Tribe provide 90% of the services required by Cotton to produce and sell Jicarilla Reservation oil and gas revenues held in trust by the United States for the benefit of the Jicarilla Indians.

CONCLUSION

Under the controlling acts of Congress the New Mexico taxes are unlawful. Under the dormant Commerce Clause, three alternative remedies are available to strike down New Mexico's taxes. Each of these requests for relief requires that the decision of the lower court be reversed.

June, 1988

Respectfully submitted,

Daniel H. Israel, Esq.
Daniel H. Israel, P.C.
1100 Stout St., #850
Denver, CO 80204
Tel. [303] 629-1100

G. Samuel Schaunaman, II, Esq.
Oxy Usa Inc.
P. 0. Box 300
Tulsa, Oklahoma 74102
Tel. [918] 561-4278

Jane E. Lein, Esq.
Cogswell and Wehrle, P.C.
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Tel. [303] 861-2150

Counsel for Appellants

APPENDIX

SUMMARY OF FEDERAL OIL AND GAS REGULATIONS APPLICABLE TO PRODUCTION ON INDIAN LANDS

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APPENDIX

SUMMARY OF FEDERAL OIL AND GAS REGULATIONS APPLICABLE TO PRODUCTION ON INDIAN LANDS

I. 25 C.F.R. Part 211

25 C.F.R. § 211.2 Leases to be made by tribes.

Indian tribes may lease their land for oil and gas development, with the approval of the Secretary of the Interior and after advertising the leasehold sale.

25 C.F.R. § 211.3 Sale of oil and gas leases.

The Superintendent of the Bureau of Indian Affairs must publish notices at least 30 days prior to the sale of leaseholds, in order to notify interested parties that oil and gas leases on specific tracts will be offered to the highest responsible bidder for a bonus and stipulated rents and royalties. The Secretary of the Interior has the right to reject all bids when, in his judgment, the interests of the Indians will be best served by doing so. If no satisfactory bid is received or if an accepted bidder fails to complete the lease, the Secretary may readvertise the lease for sale or (with the consent of the tribal counsel) lease the tract through private negotiations.

25 C.F.R. § 211.3a Leases for subsurface storage of oil or gas.

The Secretary of the Interior may, with the prior consent of the Indian owners, obtain storage leases on tribal lands and on allotted lands to provide for the subsurface storage of oil or gas.

25 C.F.R. § 211.4 Government employees cannot acquire leases.

No lease, assignment, or interest will be approved for any employee of the United States government.

25 C.F.R. § 211.5 Corporations and corporate information.

If a leasehold applicant is a corporation, it shall file evidence of authority of its officers to execute papers and shall also file a certified copy of its articles of incorporation.

25 C.F.R. § 211.6 Bonds.

With issuance of each lease, the approved lessee must furnish a bond with an acceptable company authorized to act as sole surety or with two or more personal sureties and a deposit.

25 C.F.R. § 211.8 Lands to be in compact body.

The area covered by a lease shall be in a reasonably compact body and shall generally conform to the system of public land surveys.

25 C.F.R. § 211.9 Acreage limitation.

A lessee may acquire more than one lease but no single lease for oil and gas development may be granted on Indian tribal or restricted Indian lands in excess of 2,560 acres.

25 C.F.R. § 211.10 Term of leases.

Mineral leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior and as long thereafter as minerals are being produced in paying quantities.

25 C.F.R. § 211.12 Manner of payments.

Rents and other payments due under leases shall be paid to the Superintendent of the Bureau of Indian Affairs or to such other person as may be designated by the Secretary of the Interior for the benefit of the lessors.

25 C.F.R. § 211.13 Rates of rentals and royalties under oil and gas leases.

The lessee shall pay, beginning with the date of approval of the oil and gas lease, a rental of $1.25 per acre per annum in advance during the continuance of the lease, together with a royalty of 12½% of the value or amount of all oil, gas and all other hydrocarbons produced and saved from the land. A higher rate of royalty may be fixed by the Secretary of the Interior prior to the advertisement of lands for oil and gas leases.

25 C.F.R. § 211.16 Time of making royalty payments.

Royalty payments under producing oil and gas leases shall be made monthly on or before the last day of the calendar month following the calendar month for which payment is to be made.

25 C.F.R. § 211.17 Division orders.

Lessees may make arrangements with the purchasers of oil for the payment of royalties by the purchasers, but such arrangements will not release a lessee from responsibility should the purchaser fail to pay royalties when due. Where arrangements are made for the purchasers to pay royalties, division orders permitting the purchaser to withhold the royalty interest must be executed and forwarded to the Department of the Interior for approval.

25 C.F.R. § 211.19 Diligence and prevention of waste.

The lessees must exercise diligence in drilling and operating wells for oil and gas on leased lands and must carry on all operations in a good and workmanlike manner in accordance with approved methods, having due regard for the prevention of waste of oil or gas.

25 C.F.R. § 211.20 Permission to start operations.

No operations will be permitted on any lease before it is approved by the Secretary of the Interior and written permission must be secured from the Supervisor of the Bureau of Indian Affairs before any operations are started on the leased premises.

25 C.F.R. § 211.21 Restrictions on operations.

Oil and gas leases on Indian lands are subject to the imposition of restrictions by the Secretary of the Interior as to the time for drilling wells and as to the production from any well. Such restrictions are imposed as necessary for the protection of natural resources on the leased lands and for the protection of the lessor's interests. Leases are subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease may be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

25 C.F.R. § 211.22 Penalties.

Failure to comply with a lease issued under these regulations will subject the lease to cancellation by the Secretary of the Interior or will subject the lessee to a penalty of not more than $500 per day for each day of the violation or to both the penalty and cancellation.

25 C.F.R. § 211.26 Assignments and overriding royalties.

Leases may be assigned or transferred only with the approval of the Secretary of the Interior. The Secretary will consider the assignees' qualifications for holding a lease under these regulations. Agreements creating overriding royalties or payments out of production are authorized.

25 C.F.R. § 211.27 Cancellation.

When a lessee violates any of the terms and conditions of a lease or of applicable regulations, the Secretary of the Interior shall have the right (after 30 days' notice and after a hearing, if requested timely by the lessee) to declare the lease null and void. A lessee may, with the approval of the Secretary of the Interior, surrender a lease or any part of it if he complies with the provisions of 25 C.F.R. § 211.27(b).

II. 30 C.F.R. Parts 202 and 206

30 C.F.R. § 202.100 Production records; rentals, royalties, and payments; drainage and wastes.

The Associate Director for Royalty Management must compile records of production and prices, determine royalties accrued, and estimate the amount and value of oil, gas, and other products wasted. The Associate Director provides monthly statements to lessees showing the amount of oil, gas and other hydrocarbons

produced or sold and the amount or value of production accruing to the lessor as royalty from each lease, as well as the amount lost by drainage or waste. In addition, for producing leases on Indian lands, the Associate Director must determine rental liability, record rental royalty, and other payments, and maintain lease accounts.

30 C.F.R. § 202.101 Measurement of oil.

Monthly statements of production and royalty are based on production recorded in pipeline runs or other shipments. Evidence of all shipments of oil must be furnished by pipeline or other run tickets.

30 C.F.R. § 202.102 Measurement of gas.

Gas of all kinds (except gas used for purposes of production on the leasehold or unavoidably lost) is subject to royalty.

30 C.F.R. § 202.103 Royalty rate on oil; flat-rate leases.

The royalty on crude oil is the percentage (established by the terms of the lease) of the value or amount of the crude oil produced from the leased lands.

30 C.F.R. § 206.100 Waste prevention; value determination.

The lessee is obligated to prevent the waste of oil or gas. If the BLM determines that waste has occurred, the value of oil or gas wasted will be determined in accordance with 30 C.F.R. Part 206 (product valuation).

30 C.F.R. § 206.101 Determination of gasoline content of natural gas.

Tests to determine the gasoline content of gas delivered to plants manufacturing gasoline are required to check plant efficiency and to obtain an equitable basis for allocating the gasoline output of any plant to the several sources from which the gas treated is derived.

30 C.F.R. § 206.102 Quantity basis for computing royalties on natural gas and other liquid hydrocarbon substances extracted from gas.

The quantity basis for computing monthly royalties on casing-head or natural gas or other liquid hydrocarbon substances extracted from gas is the monthly net output of the plant at which the substances are manufactured. Net output is defined as the quantity of each substance that the plant produces for sale.

30 C.F.R. § 206.103 Value basis for computing royalties.

The value of production, for the purpose of computing royalty, is the estimated reasonable value of the product as determined by the Associate Director. Consideration must be given to the highest price paid for production of like quality in the same field, to the price received by the lessee, to posted prices, and to other "relevant matters".

30 C.F.R. § 206.105 Royalty on gas.

The royalty on gas is the percentage established by the terms of the lease of the value or amount of the gas produced. Royalty accrues on dry gas after the extraction of gasoline. The value of wet gas is either the gross

proceeds accruing to the lessee from sale of the gas or the aggregate value determined by the Secretary of all commodities, including residue gas, whichever is greater.

30 C.F.R. § 206.106 Royalty on casing-head or natural gasoline or other liquid hydrocarbon substances extracted from gas.

A royalty must be paid on the value of one-third (or the lessee's portion if greater than one-third) of all casing-head or natural gasoline or other liquid hydrocarbon substances extracted from the gasoline produced from the leasehold. The value of the remainder is an allowance for the cost of manufacture, and no royalty is required. The minimum royalty is the percentage established by the lease of the amount or value of all extracted hydrocarbon substances accruing to the lessee.

30 C.F.R. § 206.107 Royalty on drip gasoline or other natural condensate.

The royalty on all drip gasoline or other natural condensate recovered from gas produced from the leased lands without resort to manufacturing process, is the same percentage as provided in the lease for other oil, except that the substance, if processed in a casing-head gasoline plant, is treated for royalty purposes as though it were gasoline.

III. 43 C.F.R. Part 3162

43 C.F.R. § 3162.1 General requirements.

The lessee must conduct all operations in a manner which insures the proper handling, measurement, disposition, and site security of leasehold production; which

protects other natural resources and environmental quality; which protects life and property; and which results in maximum ultimate economic recovery of oil and gas with minimum waste.

43 C.F.R. § 3162.2 Drilling and producing obligations.

The lessee must diligently drill and continuously produce from the well, as necessary to protect the lessor from loss of royalty by reason of drainage. The Secretary of the Interior or his authorized representative may assess a compensatory royalty to compensate the lessor if the lessee fails to drill and produce wells required to protect the lessor from loss through drianage by wells on adjacent lands.

43 C.F.R. § 3162.3 Conduct of operations.

Leasehold operations shall be conducted by the lessee or by an operator designated by the lessee. The lessee must authorize the actual conduct of operations on its behalf by designating another party as operator in a manner and form acceptable to the Department of the Interior.

43 C.F.R. § 3162.3-1 Drilling applications and plans.

Each well shall be drilled under an acceptable well spacing program at a surveyed well location approved by the Department of the Interior after appropriate environmental and technical reviews. The lessee shall submit to the Department of the Interior for approval an application for permit to drill for each well. No drilling operations may be commenced prior to the Department of the Interior's approval of the permit.

43 C.F.R. § 3162.3-2 Subsequent well operations.

A plan proposing further well operations shall be submitted by the lessee on a specified form for approval by the Department of the Interior prior to commencing operations to redrill, deepen, perform casing repairs, plug-back, alter casing, perform non-routine fracturing jobs, recomplete in a different interval, perform water shut-off, commingling production between intervals and/or conversion.

43 C.F.R. § 3162.3-4 Well abandonment.

The lessee must promptly plug and abandon each newly completed well in which oil and gas cannot be produced in paying quantities or which, after being completed as a producing well, is no longer capable of producing oil or gas in paying quantities. Abandonment must be in accordance with a plan first approved in writing or prescribed by the Department of the Interior.

43 C.F.R. § 3162.4-1 Well records and reports.

The lessee must keep accurate records with respect to all lease operations and must submit leasehold reports to the Department of the Interior on standard forms which are specified by the regulations.

43 C.F.R. § 3162.4-2 Samples, tests, and surveys.

During the drilling and completion of a well, the lessee shall conduct tests as required by the Department of the Interior. After the well has been completed, the lessee must conduct periodic well tests which will demonstrate the quantity and quality of oil and gas and water.

43 C.F.R. § 3162.4-3 Monthly report of operations.

A separate report of operations for each lease shall be made for each calendar month, beginning with the month in which drilling operations are initiated.

43 C.F.R. § 3162.5-1 Environmental obligations.

The lessee shall conduct operations in a manner which protects the mineral resources, other natural resources, and environmental quality.

43 C.F.R. § 3162.5-2 Control of wells.

The lessee must maintain safe well operating procedures, must not deviate significantly from straight vertical drilling without approval of the Department of the Interior, must maintain or restore control of any well in which the pressure equilibrium has become unbalanced, and must protect water bearing formations and other mineral bearing formations from contamination.

43 C.F.R. § 3162.5-3 Safety precautions.

The lessee must perform operations and maintain equipment in a safe and workmanlike manner.

43 C.F.R. § 3162.6 Well and facility identification.

Each well must have an identification sign which contains information specified by the regulation.

43 C.F.R. § 3162.7-1 Disposition of production.

The lessee must put into marketable condition, if economically feasible, all oil and gas from the leased land. The lessee must conduct operations in such a manner as to prevent avoidable loss of oil and gas. In

addition, the lessee must furnish storage for royalty oil for 30 days following the end of the calendar month in which the royalty accrued.

43 C.F.R. § 3162.7-2 Measurement of oil.

All oil production shall be measured by tank gauging, positive displacement metering system, or other methods acceptable to the Department of the Interior.

43 C.F.R. § 3162.7-3 Measurement of gas.

All gas production shall be measured by orifice meters or other methods acceptable to the Department of the Interior.

43 C.F.R. § 3162.7-4 Site security on federal and Indian oil and gas leases.

Each operator of a federal or Indian lease must comply with minimum standards to assist in providing accountability of oil or gas production, including:

1. All lines entering or leaving oil storage tanks must have valves capable of being effectively sealed.

2. Each Lease Automatic Custody Transfer system must employ meters that have non-resettable totalizers.

3. There must be no by-pass piping around gas meters.

4. The operator must inspect all leasehold sites to determine that minimum site security standards are being met.

5. Any person removing oil from a facility by vehicle must possess appropriate identification.

6. Theft or mishandling of oil must be reported to the Department of Interior as soon as discovered.

In addition, the regulation provides for site security plans.

APPELLEE'S

BRIEF

(11)

No. 87-1327

In The
Supreme Court of the United States
October Term, 1987

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF OF APPELLEES STATE OF NEW MEXICO, et al.

HAL STRATTON
Attorney General
HENRY M. BOHNHOFF
Deputy Attorney General
GEORGE W.K. SNYDER, JR.
Assistant Attorney General

FRANK D. KATZ
DANIEL YOHALEM*
DEBORAH A. MOLL
Special Assistant
Attorneys General
New Mexico Taxation and
Revenue Department
P.O. Box 630
Santa Fe, NM 87509-0630
Tel. (505) 827-0730

Counsel for Appellees
*Counsel of Record

August 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

1. Does federal law preempt New Mexico's oil and gas taxes imposed on non-Indian oil and gas lessees of the Jicarilla Apache Tribe where those taxes are not passed on to the tribe and have no impact on the development of tribal mineral resources or the imposition of tribal taxes?

2. Does the Commerce Clause require apportionment or allocation of taxes imposed by the State of New Mexico and the Jicarilla Apache Tribe on severance by non-Indian oil and gas lessees on the Jicarilla Apache Reservation within the State of New Mexico.

3. Does the Commerce Clause require that an Indian tribe be treated as a state for purposes of determining whether a state tax on nontribal activities conducted on an Indian reservation must be apportioned to account for taxes imposed on those same activities by the Indian tribe?

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STATUTES INVOLVED

In supplement to provisions referenced by Appellant, the relevant texts of the Act of March 3, 1927, 25 U.S.C. §§ 398a-398e, and the Crude Oil Windfall Profits Tax Act of 1980, 26 U.S.C. § 4986, *et seq.* are set forth in the Appendix, *infra*.

STATEMENT OF THE CASE

Appellant Cotton Petroleum Corporation (hereinafter Cotton) is a non-Indian petroleum company in the business of extracting oil and gas from the Jicarilla Apache Reservation located wholly within the State of New Mexico. Since 1976, Cotton has leased reservation land for oil and gas production and acquired or drilled at least 64 wells.[1] Under the terms of its leases with the Jicarilla Apache Tribe, the oil and gas which Cotton extracts belong to Cotton. Tr. 38, Cotton's Exhibit 3. Cotton pays the tribe royalties and rents for the oil and gas. J.S. at 4. Cotton's oil and gas operations on the Jicarilla Reservation are profitable. Cotton receives oil and gas prices that are at least as good or better than oil and gas prices received by other producers. The combined federal, state and tribal taxes have not deterred Cotton's development of additional wells on the reservation. Indeed, Cotton expanded its reservation oil and gas production substantially even after an increase in tribal taxes. Findings ¶5, J.S. App. 15. Cotton sells its oil to refineries off the reservation in New Mexico and transports it there by truck over New Mexico highways. Cotton uses New Mexico independent contractors and employees from off reservation to operate, drill and maintain its wells. Findings ¶¶ 2, 4, J.S. App. 14, 15.

The State of New Mexico imposes five taxes on all persons extracting oil and gas within the state. These taxes

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[1]District Court Findings of Fact (hereinafter Findings) ¶¶ 1 and 9, reprinted in the appendix to the Jurisdictional Statement (hereinafter J.S. App.) 14 and 15. Transcript of Proceedings hereinafter Tr.) 41 and 341, State's Exhibit J.

were enacted between 1925 and 1969. The total amount of these taxes equals about eight percent. Court of Appeals Opinion, J.S. App. 2. These New Mexico taxes were imposed on Cotton, not the tribe, and no economic burden whatsoever falls on the tribe by virtue of the state taxes. The cost of the tax is not passed along in any way to the tribe nor is any federal or tribal fund available to the tribe reduced by the taxes. Cotton will not pass on to the tribe any tax refund it might get through this litigation. Findings ¶¶ 6, 8 and 10, J.S. App. 15.

New Mexico provides substantial services to both the Jicarilla Tribe and Cotton. The amount of direct state expenditures on the reservation is approximately $3 million per year. The state also provides the benefits of living in an organized society to Cotton and the tribe. The state per capita spending per Jicarilla member is equal to or greater than the per capita spending on non-Indian citizens. The state's expenditures do not discriminate against the Jicarilla Reservation nor its members. The state, the tribe and the federal government all provide services on the Jicarilla Reservation. The state provides services on the reservation not provided by the other two governments. The state provides services off the reservation that substantially benefit the reservation. Jicarilla Apaches use many services provided by the state off the reservation. Findings ¶¶ 12, 13, 14, 15, J.S. App. 16.

The Jicarilla Tribe has imposed two taxes on Cotton, the total amount of which equals about six percent.[2] The tribe hired an economic consultant to determine revenue projections at different tax rates. He reported that a tax rate even higher than that ultimately selected by the tribe would not adversely affect oil and gas development on the reservation. Findings ¶ 18, J.S. App. 16-17.

[2]Apparently, effective January 1, 1988, the tribe has imposed a possessory interest tax that applies to oil and gas production equipment and amounts to two percent of the prior year's production. Appellants' Reply Brief to Motion to Dismiss at App. 4-19. Because this new tax was not in effect, it was not considered by the courts below.

The Jicarilla Tribe has benefitted from oil and gas rents, royalties and taxes. It imposes no taxes on its members, but rather it distributes over $9 million each year as a cash supplement to its members. In addition, the tribe has an annual operating budget of $13.5 million and ran a surplus during the years reviewed by Cotton's expert at trial. Tr. 163-166. A substantial portion of the tribe's tax revenues go into a permanent fund which contains approximately $50,000,000. This amount represents a substantially greater per capita Jicarilla reserve than New Mexico's permanent fund contains per each New Mexico citizen. Findings ¶ 16, J.S. App. 16.

Because these state taxes have no economic impact on the tribe and do not interfere with the tribe's ability to impose taxes, the Jicarilla Apache Tribe is not a party to this litigation and has never sought to intervene. Instead, the tribe has participated solely as *amicus curiae,* raising claims of hypothetical harm it fears may occur under other circumstances, which are not supported by the record in this case. Indeed, Leonard Atole, President of the Jicarilla Apache Tribe, called as a witness for Cotton, did not object to the state's taxation of Cotton or suggest that New Mexico's tax hindered Jicarilla economic development or the tribe's ability to raise taxes; his only concern was that he wanted to see more state expenditures on the reservation. Tr. 436.

Cotton abandoned its challenge of three of the five New Mexico taxes in the New Mexico Court of Appeals and state Supreme Court. J.S. App. 3. Thus, at issue in this case at this stage are only New Mexico's Oil and Gas Severance Tax, N.M. Stat. Ann. §§ 7-29-1, *et seq.* (1978), and Oil and Gas Emergency School Tax, N. M. Stat. Ann. §§ 7-31-1, *et seq.* (1978).[3] These two taxes together amount to a combined tax rate of less than seven percent of the

[3]Cotton appears not to recognize it is now foreclosed from challenging any other taxes because of its abandonment below. Appellant's Brief at 4, 10, 13 and 16.

value of oil and gas production. N.Mex. Stat. Ann. §§ 7-29-4 and 7-31-4.[4]

SUMMARY OF ARGUMENT

Under the special Indian preemption analysis, New Mexico's taxes imposed on Cotton do not adversely impact federal or tribal interests, even when given their broadest reading. Unlike *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982), these taxes are not imposed on the tribe, are not passed on to the tribe, and have not hindered the development of tribal resources or the imposition of tribal tax. In any event, congressional purposes in the two most closely relevant acts—the Indian Mineral Leasing Act of 1938, under which Cotton leased these lands from the Jicarilla Apaches, and the Crude Oil Windfall Profits Tax, imposing federal tax on Cotton's severance—evidence Congress' intent to permit state taxation of non-Indian lessees. Even were there no such congressional intent and some impact on federal or tribal interests, the state interest in assessing taxes in return for the governmental functions it provides to reservation residents and businesses, in excess of $3,000,000 per year, amply justifies the state taxes.

The Jicarilla Apache Reservation is within the state of New Mexico. It is not a separate state for purposes of Commerce Clause analysis or any other purpose. Oil and gas severance within reservation boundaries occurs entirely within both the reservation and the state. No apportionment of tax is required by overlapping jurisdictions "since each government is free to impose its taxes without ousting the other." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 158 (1980). Without congressional sanction, not present here, tribes cannot preempt state taxes by imposing their own taxes. *Id.* New Mexico's taxes do not discriminate against interstate or Indian commerce but are applied uniformly throughout the state, on reservation and off, no matter what the destination of the oil and gas.

[4]The tax rate on natural gas is actually $.87 per thousand cubic feet plus 3.15 percent of the value of products. *Id.*

In fact, seven percent overstates the effective tax rate because Cotton deducts royalties paid to the United States, any Indian tribe or the state of New Mexico and reasonable expenses of trucking the product to the first place of market from the value of production before it figures the two taxes. N.M. Stat. Ann. §§ 7-29-4.1 and 7-31-5.

ARGUMENT

I. INTRODUCTION.

Cotton, a profitable non-Indian oil company producing oil and gas on an Indian reservation, seeks to strike down the state of New Mexico's oil and gas taxes. Initially, Cotton's sister oil companies challenged the tribe's right, not the state's right, to tax. They lost that challenge in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), where the Court ruled that the Jicarilla Apache Tribe could impose severance taxes on oil and gas produced by non-Indian oil companies within its reservation. The Court did so cognizant of the fact that the state was also taxing the same mineral production on Indian land. 455 U.S. at 151. The Court reaffirmed its earlier conclusion in *Washington v. Confederated Tribe of the Colville Indian Reservation*, 447 U.S. 134, 158 (1980), that "there is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other." *Merrion*, 455 U.S at 151.

The attack on the tribal tax having failed in *Merrion*, Cotton now asks the Court to strike down New Mexico's tax. Cotton first claims that New Mexico's taxes are preempted by federal law under a special preemption standard developed to determine the validity of state regulation and taxation of non-Indian activity on Indian reservations.[5] Both the New Mexico trial and appellate courts

[5]See *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965); *McClanahan v. Arizona Tax Commission*,

(Continued on following page)

rejected Cotton's preemption claim. Paying close attention to this Court's admonition in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982), both courts closely scrutinized the facts and applied the preemption standard enunciated in *Ramah* and in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). As the evidence developed, it became obvious, and the trial court found, that even under this Court's exacting standard the state taxes herein did not adversely impact tribal and federal interests at all. Simply put, the magnitude of oil companies' profits rendered state taxes insignificant to oil company development plans and provided the tribe with as much income and taxes as it needed or was willing to take.

As a result of the weakness of the preemption case, Cotton also asserts that the Commerce Clause of the United States Constitution requires elimination or apportionment of New Mexico's tax. Ignoring the federal tax, it claims that New Mexico's tax is a "double tax" on its operations which is unfair and creates an impermissible burden on commerce. In essence, Cotton and its *amici* ask this Court to treat the tribe as a state and ignore the reservations location in New Mexico in order to eliminate the tax under the Interstate Commerce Clause. In the alternative, they ask the Court to import into the Indian Commerce Clause an unprecedented apportionment formula based on benefits received rather than contacts with the taxing sovereign. Cotton's novel apportionment standard would allow state taxes only to the extent of state expenditures for benefits provided directly to Cotton's oil and gas production on the reservation.

New Mexico believes this Court once again should reject any new application of the Indian Commerce Clause

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441 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987); *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 108 S. Ct. 685 (1988).

to the situation presented in this case. *See, Ramah*, 458 U.S. at 845-846. Cotton's theory would oblige this Court to set appropriate tax rates, a job best left to legislatures (state and tribal) under the ultimate control of Congress. Multiple taxation is imposed on Cotton's severance operation, but only by those governments within whose territory the severance occurs: the Jicarilla Apache Tribe, the state of New Mexico and the United States. Cotton is simply being taxed by the overlapping sovereigns that have jurisdiction over its operations.

New Mexico asks this Court instead to reaffirm the applicability of the preemption doctrine, to apply that analysis to the particular facts of this case and to uphold New Mexico's taxes. New Mexico suggests the Court go further and clarify the preemption inquiry for application to future cases by restoring fundamental preemption standards. State taxes should be prohibited only when congressional legislation requires it, either explicitly or by implication. Language in recent cases suggests that the Court may have moved away from a determination of whether Congress intended in specific federal laws to prohibit state taxes even by implication. *Ramah*, 458 U.S. at 838, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334. These cases appear to eschew statutory interpretation in favor of deciding preemption based on the impact of state taxes on general statements of congressional policy. Confirmation by the Court that it does not intend to abandon statutorily-grounded analysis would provide greater clarity for future tax administration and litigation.[6]

Additionally, New Mexico asks the Court to restore evenhanded evaluation of the state interest involved in

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[6]The fact-driven impact-on-general-federal-policies test, rather than one that relies on congressional intent, has resulted in expensive and lengthy litigation to determine, on a case-by-case basis, whether taxes impact federal policies or tribal interests. It also has created considerable uncertainty for state agencies, taxpayers and courts. *Washington v. Confederated Tribe of the Colville Indian Reservation*, 447 U.S. 134, 176-177 (1980) (Rehnquist, J., concurring in part and dissenting in part).

taxing reservation activity. The Court's consideration of state interest has been shadowed from the beginning by the false premise that states have no responsibility on reservations. *Warren Trading Post*, 380 U.S. at 691. To the contrary, the state's obligation for providing government services to its citizens on the reservation is substantial and growing. The proper counterbalance to federal and tribal interests which affect the tribe as a whole should be the state's need to raise revenue to fund services which benefit the tribe as a whole.

II. NEW MEXICO'S TAXES ARE NOT PREEMPTED BY FEDERAL LAW AND DO NOT INTERFERE WITH TRIBAL SELF-GOVERNMENT.

A. Current Law Requires a Particularized Inquiry Into Federal and Tribal Interests to Determine Whether the State Tax is Preempted.

1. *Development of the Special Indian Preemption Standard.*

The general rule governing federal preemption of state taxes requires an explicit congressional prohibition for taxes to be preempted. Implicit preemption is not enough. *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933). The single exception to this general rule is on Indian reservations. On reservations, Indians cannot be taxed by states unless specifically authorized by Congress. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). "More difficult questions arise where, as here, a state asserts authority over the conduct of non-Indians engaging in activities on the reservation." *White Mountain*, 448 U.S. at 144.

Under modern precedents, congressional authority is no longer required for states to tax non-Indian business

activities on reservations.[7] States may tax that activity unless preempted by federal law. But the standard for preemption on Indian reservations differs from the explicit preemption standard applied elsewhere. In a series of cases over the last twenty-three years, the Court has developed a unique preemption-of-taxes-by-implication standard applicable on Indian reservations to ensure that state taxes do not harm tribal interests. *See* cases cited, *supra*, note 5.

The seminal language in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), described the analysis when a state seeks to tax non-Indian business activity on the reservation, as follows:

> [the Court] examine[s] the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry . . . call[s] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. at 144-145. The Court in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) succinctly summarized the current standard:

> State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

462 U.S. at 334.

The first step in applying this analysis is to discover the federal and tribal interests from the purposes and policies of relevant federal law. The second step is to determine whether the state taxes interfere with those fed-

[7] The federal instrumentalities doctrine, which forbade state taxation of federal or tribal lessees absent congressional approval, was overruled in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938).

eral and tribal interests or block the achievement of congressional purposes. If there is no impact, then there is no basis to find preemption. If the taxes do interfere with the federal and tribal interests, however, they will be preempted, unless "the state interests at stake are sufficient." *New Mexico v. Mescalero*, 462 U.S. at 334.

In analyzing the validity of its taxes herein, New Mexico has had to grapple with the contradictions inherent in the Court's recent cases. *See Colville*, 447 U.S. at 176-181 (Rehnquist, J.) and *Ramah*, 458 U.S. at 847-857 (Rehnquist, J., dissenting). Federal preemption has always depended on congressional intent. But in *White Mountain, Ramah* and *New Mexico v. Mescalero*, the Court has seemed to endorse a doctrine that preempts state taxes even if they have only minor impact on any federal purpose the Court can discern. Although the Court in *White Mountain* asserted that the special Indian preemption standard is unlike that which "has emerged in other areas of law because of the unique historical origins of tribal sovereignty," 448 U.S. at 143,[8] New Mexico does not think the Court has abandoned, or properly can abandon, congressional intent as the foundation for preemption. Indeed the Court should emphasize in this case that its particularized inquiry into various interests is meant to discover what Congress intended in the controlling federal law. (See discussion below in Section II(C).) Nonetheless, it is clear that New Mexico's taxes imposed on Cotton do not interfere with even the broadest reading of federal and tribal interests involved, interests derived from general congressional policy towards Indians, not limited to what Congress may have intended in specific statutes concerning non-Indian severance on reservations.

[8]There has also been considerable dispute within the Court as to the manner in which the backdrop of tribal sovereignty should be used in the preemption analysis: to determine whether tribes historically had control over a given area of activity (Rehnquist, J. dissenting in *Colville*, 447 U.S. at 178-181; O'Connor, J., *Rice v. Rehner*, 463 U.S. 713, 720-722 (1983)), or to justify moving from an analysis of congressional intent to preemption based on any impact on general federal policies *(White Mountain*, 448 U.S. 136 at 143-145; *Ramah*, 458 U.S. at 838).

2. *General Federal and Tribal Interests Involved in this Case.*

There is substantial agreement among all parties and courts as to what constitutes this broadest reading of federal and tribal interests: the economic development of tribal mineral resources and the right of the tribe to govern itself.[9] The Ninth Circuit, in its remand of *Crow Tribe v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *amended* 665 F.2d 1390 (1982) *(Crow I)*, described these interests as comprising the test the tribe must meet in its challenge to state tax on a non-Indian mineral lessee:

> To support its claim at trial, the tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources. . . .

Id. at 1117.

Under this broad analysis, any state tax, even if not passed on to the tribe, that "substantially" impedes, discourages or reduces the development of tribal mineral resources thus would conflict with the federal and tribal policy of encouraging economic development and be preempted, unless justified by a sufficiently strong state interest. Likewise, state taxes that "substantially" interfere with tribal sovereignty and tribal self-government by discouraging on-reservation business or by inhibiting the tribe from raising revenue for its support would be preempted absent a significant state interest.[10]

[9]These general interests are derived first from the Indian Mineral Leasing Act of 1938, *see Montana v. Blackfeet*, 471 U.S. at 767, n. 5; *Crow Tribe v. Montana*, 650 F.2d 1104, 1112-1113 (9th Cir. 1981), *amended* 665 F.2d 1390 (1982); and secondly, even more generally from a number of statutes Congress has enacted to promote tribal self-government: the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq.*, and the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. § 450, *et seq.* *See New Mexico v. Mescalero*, 462 U.S. at 335, n. 17, and *Cabazon*, 107 S. Ct. at 1092, n. 19.

[10]The irony of the special reservation preemption standard is that it replicates the federal instrumentality doctrine rejected

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B. New Mexico's Severance Taxes Do Not Intrude on Even the Broadest View of Federal and Tribal Interests.

The facts proven at trial unequivocally show that New Mexico's taxes imposed on Cotton did not intrude on these broad federal and tribal interests. First, the economic development of tribal mineral resources showed no signs of slowing as a result of combined state and tribal taxes. George Donkin, the state's expert at trial,[11] testified that the substantial profits resulting from oil extraction rendered taxes an insignificant factor in production decisions for oil companies. Tr. 463-465, 472-476. The significant factors, he testified, were geology, access to markets, costs of drilling and pumping, and governmental regulation. Tr. at 453-458. Pressed under cross-examination to agree that state taxes are a factor, Donkin was presented an unrealistic hypothetical situation in which a producer has the opportunity to drill two equally lucrative wells, one on the Jicarilla Reservation and one off, but only enough money to drill one well. Asked which well would be drilled, George Donkin testified:

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over fifty years ago. That doctrine forbade state taxes of federal instrumentalities on the theory that the tax would be passed on to the federal government and inhibit federal sovereign control over its lessees and contractors. *Gillespie v. Oklahoma*, 257 U.S. 501 (1922). In *United States v. New Mexico*, 455 U.S. 720 (1982), the Court declined to resurrect the doctrine in confirming New Mexico's authority to tax gross receipts of federal contractors. The Court refused to confer immunity on the contractors "simply because the tax has an effect on the United States or even because the federal government shoulders the entire economic burden of the levy." *Id. at* 734. Somehow Indian tribes have gained greater immunity from state taxes than the federal government has. *See Ramah*, 458 U.S. at 857 (Rehnquist, J., dissenting).

[11]Donkin is the former Vice Chairman of the Federal Power Commission Natural Gas Survey Task Force on Exploration and Development of Natural Gas Bases and an expert in energy economics who has provided considerable analysis and advice to industry on the San Juan Basin (in which the Jicarilla Apache Reservation is located).

> My best judgment is that he is going to drill both wells. . . . I think he will go to a banker and get enough money to drill a second well too. . . . If the one well looks attractive and the other one is going to be associated with a tax of five to six percent more, it is going to be attractive too; you can take that prospect to any banker and he will finance you.

Tr. 501-502.

Cotton's actual behavior confirmed this expert's conclusion. The combined burdens of federal, state and tribal taxes did not lessen Cotton's interest in further developing its reservation oil leases. Douglas E. Wood, Denver Division Production Manager for Cotton, testified that Cotton planned to drill 12 new wells in that year (1986)—the third highest annual increase during its ten years on the reservation. Tr. 44. State's Exhibit J.

In its brief before this Court, Cotton does not assert that state taxes interfere with federal and tribal economic development interests. Cotton's witnesses at the trial were virtually silent on the subject.[12] Leonard Atole, President of the Jicarilla Tribe, testified for Cotton but did not object to the state taxes or believe they were interfering with tribal business or sovereignty. As a factual matter, no impact on tribal economic development was shown.

With regard to tribal sovereignty, the second broad federal and tribal interest, New Mexico's taxes did not impede the tribe from imposing whatever level of tax it wished. The fortuitous timing of the tribe's own actions proved conclusively that the combined state and federal tax load did not affect the tribe's ability to raise the level of tax revenue it desired. In 1984, the middle of the period

[12]Cotton's lone assertion at trial that the state's taxes affected natural gas development (Tr. 65) was rebutted on cross-examination by the admission that Cotton's natural gas sales were locked in by a contract which required the pipeline company to take or pay for the gas at a fixed price regardless of state and tribal taxes (Tr. 88-89). The witness, Douglas Wood, also admitted in his direct examination that he could not "say for sure if a reduced tax burden would cause us to have more exploration." Tr. 76-77.

in question, the tribe commissioned a study from economist Alfred Parker, Chairman of the Economics Department of the University of New Mexico, to determine its taxing options. Dr. Parker's study of revenue projections revealed that a tribal tax of either three percent or six percent would have no appreciable impact on the mineral lessees and would not slow development or production. Tr. 161-162. The tribe then proceeded to determine its budgetary needs for the tribal government. It figured in the tribal constitutional requirement that fifteen percent of the tribe's entire annual income must go into the tribal permanent fund, Tr. 160-161, which approached $50,000,000 at time of trial.[13] It included the distribution of well over $9 million of tribal income annually to the 2,500 tribal members (almost $4,000 per Jicarilla). With these expenditures in mind, the tribe decided to impose a five percent tax to fulfill its revenue needs. Tr. 440. The tribe knew from Dr. Parker's study that it could impose a tax of at least six percent, and perhaps considerably higher as Dr. Parker made no determination of the upper limit. But the tribe chose five percent. In the face of these facts, Cotton was unable to offer even a shred of evidence that New Mexico's taxes impeded collection of Jicarilla taxes or any other aspect of tribal sovereignty.[14]

After due consideration of this evidence, the District Court found that the imposition of state taxes upon Cotton's operations neither adversely affected oil and gas production on the reservation nor impeded collection of

[13]Although unable to confirm the amount of the corpus of the fund, Dr. Parker did testify to an annual income exceeding $5,000,000, permitting the inference of a total fund balance exceeding $50,000,000. Tr. 160. At this level, the Jicarilla Apache per capita share of its permanent fund substantially exceeds the state citizens' share of the state severance tax permanent fund, which, of course, the Jicarilla also share. (Over $7.7 million of road work was done on the reservation with proceeds from the state fund. Tr. 363.)

[14]Neither does the Jicarilla Apache Tribe in its Amicus Brief. The absence of harm to the tribe is most clearly demonstrated by its wait and see attitude, in which it chose not to be a party to this litigation, but has participated as *amicus curiae* at each stage instead.

tribal taxes.[15] The Court of Appeals, after carefully reviewing the record and the lower Court's findings, summed up the evidence in this way:

> Cotton, not the tribe, pays the taxes in question. Neither does the record support a showing of interference with the tribe's economic development or sovereignty. The tribe's economic interests are not impeded in light of the fact that Cotton: 1) has drilled twelve new wells (direct testimony of Cotton's witness), 2) shows no sign of disrupting production because of the tax burden, and 3) reaps sufficient profits to pay taxes to the tribe and the state.
>
> The tribe concedes that state laws apply to non-Indians within the reservation if the laws do not infringe on the tribe's sovereignty and rights of self-government. Although the tribe [as Amicus] asserts that the multiple taxes interfere with the tribe's right to increase its taxes and thereby raise revenues for governmental services, the tribe cites no evidence for this claim. The record contains no evidence for this claim. The record contains no evidence of an impact on tribal sovereignty; indeed, the tribe imposes its own taxes, which are not challenged by Cotton. The tribe's own consultant indicated that the tribe could charge an even higher tax despite the state taxes imposed on Cotton.

J.S. App. 11-12.[16]

[15]Findings ¶¶ 5, 18 and 19, J.S. App. 15-17. See also subsidiary findings pertaining to Cotton's competitiveness, the tribe's insulation from the state taxes, and Cotton's profitability. Findings ¶¶ 5, 8 and 10, J.S. App. 15.

[16]The facts of this case are thus wholly different from those recently presented to this Court in *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 108 S. Ct. 685 (1988) (*Crow II*). In *Crow II*, the Ninth Circuit found that Montana's 32 percent tax had driven coal production out of Montana (and, therefore, off the Crow Reservation), deprived the tribe of substantial income, and overwhelmed the tribe's 25 percent severance tax (which allowed a credit for state taxes paid). *Id.* at 899. Based on these facts, the Court of Appeals rightly found Montana's tax had a severely detrimental impact on important federal policies and on the tribe's interest in self-government. *Id.* at 903.

Cotton and its *amici* are unable to gainsay these facts.[17] They rely instead on intuition and "common sense," suggesting that the combined state and tribal tax rate of fourteen percent on the reservation, being more than the state rate alone of eight percent, simply must discourage reservation severance. But the facts in evidence belie this speculation for the straightforward reason oil company profit levels were sufficiently high to render this rate differential irrelevant. The amicus brief of the Navajo Tribe cites certain theoretical economic studies for the proposition that in the long run, in a free market situation, the tax burden on producers must eventually affect the tribe. But these economic theorists did not testify at trial and did not look into the facts of this case. Their theories do not bear out under the particular facts herein according to the testimony of economists at trial.[18] Furthermore, neither of Cotton's economists contradicted the state's testimony that these taxes had no detrimental impact on mineral development.

Cotton also argues that if the state were prohibited from taxing, that money would be "available" to the tribe. But that is neither true nor relevant. No money would be available to the tribe because those years are past and the tribe already has received all rents, royalties and taxes to which it is legally entitled. Likewise, any

[17]Cotton and its *amici* imply from time to time that New Mexico imposed its taxes on the tribe, or the reservation resources, or real property of the tribe, hoping to create the impression that the state is diverting tribal wealth from the reservation. This is utterly untrue. The tribe chose to sell these oil and gas resources to Cotton for a price approved by the federal government. The resources then belong to Cotton, not the tribe. The state is taxing only Cotton. The portion of value of severance representing tribal royalties is not taxed.

[18]Because the existing leases are in effect as long as oil is produced, the tribe's royalty rate is fixed and cannot be renegotiated, Tr. 90, nullifying a major factor in these theoreticians' argument. Furthermore, the Jicarilla Tribe is no longer entering into new mineral leases but engaging in joint ventures which the state cannot tax, so any theoretical effect on future Jicarilla returns is likewise obviated. (*See*, Brief of Jicarilla Apache Tribe at 1; Tr. 168-169.)

"availability" of this money paid as state taxes is irrelevant because Cotton already had ample profit margin "available" to pay more taxes than the tribe wished to impose.[19]

Finally, Cotton's *amici* suggest that Cotton's failure to pursue the preemption theory caused incomplete analysis in the trial court. But both the trial court and the Court of Appeals specifically focused on the preemption standards; the evidence simply precluded the finding of interference with federal and tribal interests. Nor was the trial court's reliance on "economic" impact on the tribe incorrect. It is only by that economic impact that the federal or tribal interests are impaired when taxes are at issue.[20]

Even using the broadest interpretation of the special Indian preemption doctrine most favorable to tribes, New Mexico's taxes did not harm federal or tribal interests and are not preempted. This conclusion is strongly confirmed by examining the directly relevant statutes to determine whether Congress intended to preempt state taxation of reservation oil and gas lessees.

[19]It is ironic that were Cotton to prevail on the argument that these taxes interfered with tribal interests, the tribe would not benefit at all. It would receive no money; any refund would simply go to increase Cotton's profits further, with a substantial portion going to the federal government due to the loss of state tax deductions in the Windfall Profits Tax and the Corporate Income Tax.

[20]Some *amici* argue that the Court should ignore the record here because that would make federal preemption subject to the "vagaries of the market." See, *e.g.*, Briefs of Navajo Nation at 16 and Jicarilla Apache Tribe at 12. But a particularized factual inquiry into the actual effect state taxes have on asserted interests is exactly what is required by *White Mountain* and *Ramah*. The identified federal and tribal interest—the development of tribal mineral resources—is inevitably based on market conditions. Of course, the principal reason for *amici's* objecting to reliance on the record is the overwhelming weight of the evidence in this case that state taxes do not interfere with federal or tribal interests. For this same reason, at an earlier stage of this case they opposed this Court's jurisdiction, even though now they argue for reversal.

C. Congress did not Intend to Prohibit the State from Taxing Non-Indian Oil and Gas Lessees on Reservation Land.

The development of the special Indian preemption doctrine reflects an effort by the Court to protect tribal interests in the absence of specific guidance from Congress. Because state taxes are not preempted by implication in any other area, the Court was called upon to forge a new test. *White Mountain*, 448 U.S. at 143. The particularized inquiry into federal, state and tribal interests articulated in *White Mountain*, *Ramah* and *New Mexico v. Mescalero*, however, has evidently resulted in the Court's moving away from a determination of congressional intent. Instead the Court seems to measure the state tax against the generalized congressional policy encouraging tribal self-determination, without regard to whether or not Congress intended to forbid state tax in the particular area.[21]

New Mexico believes that the Court should refocus attention more closely on congressional intent as the foundation of the federal preemption inquiry. The legal basis of the preemption doctrine is this Court's application of the Supremacy Clause of the United States Constitution. *Warren Trading Post*, 380 U.S. at 686. This, of necessity, demands an inquiry into what Congress has or has not done. A state's tax should be preempted only if an examination of "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence"

[21]Certain language in *New Mexico v. Mescalero* may be read to imply that the Court has abandoned congressional intent as a necessary standard for preemption.

> By resting preemption analysis principally on a consideration of the nature of competing interests at stake, our cases have rejected a narrow focus on congressional intent to preempt state law as the sole touchstone.

462 U.S. at 334. It is by no means clear, however, that the Court intends so radically to expand the sweep of the Supremacy Clause as might be inferred from this language.

reveals a congressional intent to prohibit the taxes. *White Mountain*, 448 U.S. at 144-145. Given the strict requirement outside Indian reservations that exemption from state taxes will be found only where Congress explicitly so directs, abandonment of even implicit congressional intent in the special Indian preemption analysis seems particularly unjustified. In determining whether Congress intended to foreclose state taxes in this area, two enactments are particularly relevant.

1. *Congress Did Not Intend the Indian Mineral Leasing Act of 1938 to Preempt State Taxation of Non-Indian Mineral Leases.*

The intent of the Congress that passed the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a, *et seq.*—the enactment that specifically authorized these leases—is most relevant. *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 166 (1980) (The Court must "interpret [statutes] in light of the intent of the Congress that enacted them."). An examination of the history of that legislation in the context of other statutory law and judicial principles of the time reveals no intent to prohibit state taxation of non-Indian mineral lessees. Rather than preempting state taxes, as Cotton claims, the 1938 Act leaves intact earlier statutes and case law approving taxation of non-Indian lessees.

The 1938 Act on its face neither prohibits state taxes nor expressly repeals the specific taxing authority previously granted states in the Act of March 3, 1927, 25 U.S.C. § 398a, *et seq.*[22] The legislative history of the 1938 Act reveals no congressional concern for the impact state taxation had on Indian or non-Indian mineral production,

[22]The Act of March 3, 1927, which authorized leasing of tribal oil and gas on executive order reservations (such as the Jicarilla Apache Reservation), contains an explicit approval of state taxation of the lessee's oil and gas production. 25 U.S.C. § 398c. A similar provision in the Act of May 29, 1924 applicable to treaty reservations was held to authorize state taxation of non-Indian lessees' production on Indian reservations in *British-American Oil Producing Company v. Board of Equalization of Montana*, 299 U.S. 159 (1936).

no displeasure with the Court's approval of state taxation of non-Indian lessees in *British-American Oil Producing Company v. Board of Equalization of Montana*, 299 U.S. 159 (1936), and no "indication that taxation by the states was one of the evils Congress sought to eradicate through the 1938 Act," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 771 (1985) (White, J. dissenting).[23] Under ordinary principles of statutory construction, Congress' silence as to state taxing authority in the 1938 Act would mean that it did not intend to overrule the authority granted by the 1924 and 1927 Acts and this Court's af-

[23]There is no basis for inferring from the 1938 Act a policy of guaranteeing tribes "maximum profits" from their mineral leases as Cotton implies. Cotton Brief, pp. 16, 24, n. 10. The language quoted by the Court in *Blackfeet* that one of the purposes was "to ensure that Indians receive the 'greatest return from their property,'" 471 U.S. at 767, n. 5, comes from a letter from the acting Secretary of the Interior quoted in the Senate and House reports and refers to his concern that lessees of Indian mineral lands not be limited in their extralateral rights in any one claim. The acting Secretary wanted lessees to be able to claim sufficient acreage to make it efficient and profitable to mine stone, sand, gravel, coal and metalliferous minerals. The full quotation from the acting Secretary's letter is instructive.

> It is not believed that the present law is adequate to give the Indians the greatest return from their property. As stated, present law provides for locating and taking mineral leases in the same manner as mining locations are made on the public lands of the United States; but there are disadvantages in following this procedure on Indian lands that are not present in applying for a claim on public domain. For instance, on the public domain the discoverer of a mineral deposit gets extralateral rights and can follow the ore beyond the side lines indefinitely, while on the Indian lands under the act of June 30, 1919, he is limited to the confines of the survey markers not to exceed 600 feet by 1,500 feet in any one claim. The draft of the bill herewith would permit the obtaining of sufficient acreage to remove the necessity for extralateral rights with all its attending controversies.

Senate Report 2; H.R. Rep. No. 1872, 75th Cong., 3rd Sess., 2 (1938). This understanding is reinforced by the text of the remainder of the acting Secretary's letter which seems to be primarily concerned with the needs of the mineral producer-lessees.

firmation of that authority in *British-American Oil*.[24] Even under the special rule that statutes are to be construed generously in favor of Indian tribes, *McClanahan*, 411 U.S. 164, 174 (1973), there is no basis for inferring a state tax exemption for non-Indian lessees. *See Thomas v. Gay*, 169 U.S. 264 (1898) (upholding state taxation of non-Indian lessees grazing cattle on Indian reservations even though the Act of February 28, 1891, 25 U.S.C. § 397, was silent on the issue). Given the line of authority from *Thomas v. Gay* through the 1924 and 1927 Acts to *British-American Oil Company*, it is stretching even liberal canons of statutory construction to find that Congress' silence in the 1938 Act demonstrates any intent to do anything other than allow state taxation of non-Indian lessees to continue.[25]

[24]Sutherland Stat. Const. § 23.10 (4th Ed.) (presumption against implied repeal). Further, "[on] subjects to which the legislature gives continuous close attention, such as the internal revenue laws, the presumption against implied repeal may have greater than average force." *Id.* at p. 347. Here, the Congress considered Indian mineral rights at least in 1921, 1922, 1924, 1926, 1927 and 1938 (25 U.S.C. §§ 396a, 398, 399, 400, and 400a) and Indian governmental authority in 1934 (25 U.S.C. §§ 461, et seq.).

[25]See the *Amicus Curiae* brief of the State of Utah, which discusses in detail the interplay of the demise of the federal instrumentalities doctrine, the 1927 Act and 1938 Act. For many years, this Court relied on the so-called "federal instrumentalities doctrine" to forbid states from taxing contractors and lessees of the federal government. In *Gillespie v. Oklahoma*, 259 U.S. 501 (1922), the Court applied that doctrine to lessees of Indian tribes. In response, Congress was required in the Indian Mineral Leasing Acts of 1924 and 1927 to specifically authorize states to tax. After several years of limiting the federal instrumentalities doctrine and at the urging of the Solicitor General, the Court finally extinguished the doctrine in *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938) and overruled *Gillespie*. Thereafter, when the 1938 Act was enacted, it was no longer necessary for Congress to expressly authorize states to tax oil and gas lessees on the reservation. Extensive legislative history of 1927 Act emphasized Congress' intent to ensure some state revenue from these lessees by tax or royalty in recompense for state services provided on the reservation. It is unreasonable to

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The Court's previous review of the 1938 Act in *Montana v. Blackfeet Tribe of Indians* does not contradict this conclusion. There the Court decided that Congress had not authorized states to tax Indian tribes' income from oil and gas royalties. In so holding, the Court relied on the different standard applicable to Indians—that states will be allowed to tax Indians on reservations "only when Congress has made its intention to do so unmistakenly clear." 471 U.S. at 765 (citations omitted). Applying that strict requirement of express congressional permission, the Court concluded that Congress had not specifically authorized state taxation of Indians in the 1938 Act. *Id.* at 766-768. Here, New Mexico is taxing oil production by non-Indians and a different rule applies. States may tax non-Indians' activities on reservations unless Congress explicitly or implicitly preempts it.[26] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S.

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conclude that Congress would have reversed its view on permitting state taxation of Indian mineral lessees in the 1938 Act without a single bit of discussion.

[26]Section 7 of the 1938 Act contains a general repealer: "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed." Ch. 198, § 7, 52 Stat. 347. Does this general repealer eliminate the specific authorization for state taxation of mineral lessees in the 1927 Act? If the general repealer did not repeal the state tax provision in the 1924 and 1927 Acts, then state taxation of non-Indians would not be deemed inconsistent with the 1938 Act. The Ninth Circuit in *Blackfeet Tribe of Indian v. Montana*, 729 F.2d 1192, 1200 (1984), in fact ruled that the 1938 Act did not repeal the 1924 Act's taxing authority. This Court did not reach that question when it affirmed. 471 U.S. 759, n. 6 (1985). Since taxation of non-Indians was not before either court, the 1938 Act's repealer's effect on the preexisting law allowing taxation of non-Indians remains unresolved. Compare *Blackfeet* majority, 471 U.S. at 767, n. 6, with dissent, 471 U.S. at 769. Nonetheless, it may be significant that the Court chose not to decide *Blackfeet* the easy way by concluding that the 1924 Act (or 1927 Act) was inconsistent with the 1938 Act and had been repealed. That decision leaves considerable room for the Court here to confirm that the 1938 Act did not repeal the 1924 or 1927 Acts, was not inconsistent with the tax provision in those Acts, and therefore, certainly does not imply a congressional intent to deny states permission to tax non-Indian mineral lessees.

134, 151 and 161 (1980). The 1938 Act does not provide that preemption.

Cotton's main preemption argument concerning the 1938 Act is that regulations promulgated thereunder constitute a comprehensive federal regulatory scheme that leaves no room for the state taxes. Cotton Brief at 19-22. But the issue has never been the number of regulations or the extent of federal specifications in general—held up as a talisman to ward off state taxes. The issue is whether the particular federal statutory scheme and the policies underlying it, interpreted generously toward the tribes, indicate Congress' intent to prohibit state taxes.[27] A review of the federal oil and gas regulations applicable to production on Indian lands set forth in the Appendix to Cotton's Brief reveals not a single federal regulation of the non-Indian lessee's costs, profit margin, rate of return or liability for state or federal taxes. The extensive regulations govern such concerns as well production, payment of tribal royalties, accounting to the tribes, protection of tribal natural resources, and waste prevention. They are aimed at protecting tribes from non-Indian corporations. Even a reading of these regulations generous to tribes does not reveal how state taxes interfere with their implementation. If the comprehensive scheme does not necessitate prohibition of state taxes, there are no grounds to find congressional intent to preempt them.

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[27]*White Mountain* and *Ramah* are not to the contrary. Although the Court in each case refers to a comprehensive federal regulatory scheme, it relies on specific policies in the federal regulations that were inconsistent with the state taxes. Thus the taxes in *White Mountain* violated the specific federal policy to reserve "the benefit of whatever profits [the forest] is capable of yielding" to the tribe by reducing those profits. 448 U.S. at 149. And in *Ramah* the state taxes "necessarily impede[d] the clearly expressed federal interest in promoting the 'quality and quantity' of educational opportunities for Indians by depleting the funds available for the construction of Indian schools." *Id.* at 842.

2. *The Crude Oil Windfall Profits Tax Makes Clear Congress' Willingness to Tax Tribal Oil and Gas Lessees.*

If the Court seeks to derive current federal policy from more recent congressional enactments,[28] the Crude Oil Windfall Profits Tax, P.L. 96-223, 94 Stat. 229, 26 U.S.C. §§ 4986-4998, most directly concerns taxation of severance of oil and gas on reservations by non-Indians.

The tremendous profit level of oil and gas companies in 1979 led Congress to enact the Crude Oil Windfall Profits Tax in which Congress did several things. First, it recognized the excessive level of oil company profits by imposing a seventy percent severance tax on the difference between the old, regulated price of oil and the OPEC-inspired $28-30 per barrel price Cotton was obtaining during this period. 26 U.S.C. § 4987. Secondly, Congress applied this tax to reservation production of non-Indian lessees such as Cotton. Had Congress believed Indian oil and gas development through lessees was threatened by such severance taxes, it certainly could have, and would have, excluded all reservation production. Instead, it exempted only production by tribes or members subject to federal trust responsibility. 26 U.S.C. § 4994(d). (This is consistent with the interpretation of the 1938 Act in *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759 (1985), which prohibits state taxation of tribal royalties but implicitly permits taxation of the non-Indian mineral lessees.) Thirdly, Congress granted oil producers a deduction for state severance taxes paid up to a rate of 15 percent. This deduction reflects Congress' acceptance of the reasonableness of a state severance tax up to that level (a higher level than the combined state and tribal taxes imposed on Cotton here). The deduction functions to hold producers harmless from duplication of state and federal tax.

[28]Language from recent acts generally supporting tribal self-government relied upon by Cotton does not appear particularly pertinent to determining congressional intent toward state taxation of non-Indian mineral lessees. See statutes referred to in fn. 9, above. The Indian Self-Determination Act is a grant-in-aid program aimed at increasing Indian self-determination by providing federal funds for tribally-run governmental and health services and for education and employment programs. Neither its "congressional statement of findings," its "congressional declaration of policy," 25 U.S.C. §§ 450 and 450a, nor specific sections of the act suggest any congressional intent with respect to state taxation of severance by non-Indians. Similarly, the Indian Finance Act creates a federal lending and insurance program aimed at stimulating Indian and tribal business enterprises. The Act has nothing to do with and has provided no financial support for Cotton Petroleum's leases, mineral production, or any other aspect of Cotton's relationship with the tribe. In addition, there is nothing in the Act to suggest that the state cannot tax Cotton's severance. *Cabazon's* mention of one of the Act's purposes as helping Indians "enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities," 25 U.S.C. § 1451, is certainly not to the contrary. 107 S. Ct. at 1092, n. 19. See Cotton's misinterpretation of this purpose in its Brief, p. 25. Federal support for tribal economic development does not imply a tax exemption for oil companies reselling oil and gas purchased from the tribes.

Even more significantly, however, the final bill did *not* provide a deduction for Indian severance taxes paid by oil companies, although the Senate version had. This conscious decision not to include a deduction for tribal severance taxes evidences Congress' attitude that those tribal taxes are not of such primary importance as Cotton implies. Congress clearly anticipated that tribal taxes would cause a multiple tax burden which would raise producers' costs. It decided against protecting reservation severance from this disadvantage. If Congress believed that oil and gas development was such a fragile flower entitled to extraordinary protection as Cotton and the *amici* imply, it most certainly would not have imposed the Crude Oil Windfall Profits tax on reservation production or would have allowed a deduction for tribal taxes. The Windfall Profits Tax reveals a congressional policy to permit non-Indian severance on the reservation to bear normal costs of business, including taxes, without any extraordinary protection.

D. The State's Interest in Taxing Cotton is Substantial and Legitimate.

In every case previously decided under this special Indian preemption doctrine, the state assertion of au-

thority has directly impacted federal and tribal interests.[29] In this case, however, the state tax was not passed on to the tribe in any way and the uncontradicted evidence showed no other impact on federal or tribal interests. Thus the Court need not search for a justifying state interest. Nonetheless, the state interest in collecting taxes from Cotton is strong.

1. *The Appropriate State Interest is the State's Need to Raise Revenue to Provide Services to the Tribe and its Members On and Off the Reservation.*

The most appropriate justification for taxation of non-Indian reservation activity is the same as for all taxation—the provision of state services and benefits to state citizens, particularly substantial benefits to tribal reservation residents. Preemption is not invoked where state taxes impinge only on the interests of the non-Indian taxpayer—be it a trading post, a construction company or an oil company. The taxpayer's interest is not part of the equation except as it affects tribal interests. It is only when the tax is passed on to the tribe, or when tribal or federal interests are otherwise impacted, that the Court will look to the state interest to justify the tax. The federal and tribal interests, against which the state interest is measured, are the broad interests of the tribe—here the economic development of tribal resources and the tribe's right to raise taxes for its own governmental purposes. These affect the tribe as a whole, not just the

[29]In *Warren Trading Post* and *Central Machinery*, the state tax directly increased prices charged to Indian customers. *McClanahan* concerned state tax imposed on an Indian's income. The tax in *White Mountain* was passed on to the tribe, directly reducing its profits from its timber operation. Similarly, in *Ramah* the tax depleted the funds available for construction of Indian schools. State regulation in *New Mexico v. Mescalero* blocked tribal control over its wildlife resources and in *Cabazon* completely prohibited the tribe's bingo operation. Finally, in *Crow*, the extraordinary state tax substantially slowed extraction of coal from Crow mineral leases (indeed from all Montana coal fields) and consumed the tribe's own tax. In each case, the impact was directly on tribal and federal interests.

activity being taxed. Therefore the justification for interference with these general tribal interests should be on the basis of services provided generally to the tribe.[30]

Unfortunately, in evaluating state benefits and services to tribes, a misperception of the state role on the reservation has plagued the preemption analysis from its inception, obscuring the proper state interests. Contrary to the statement in *Warren Trading Post* that "federal legislation has left the states with no duties or responsibilities respecting the reservation Indians," 380 U.S. at 691, the exact converse is true. The federal Indian self-determination policy has shifted responsibilities to tribes and states. Few reservations are blessed with the resources to provide those services themselves. So the states increasingly end up bearing the costs of providing normal government services on the reservation. Reservation residents are citizens and entitled to the same services and benefits as every other state citizen.[31] Most Indian chil-

[30]The Court in *Ramah* recognized that the state may properly justify imposing its taxes "in return for the government functions it provides to those who must bear the burden of paying the tax." 458 U.S. at 843. The Court's reference is to the tribe, to whom the economic burden of the tax was passed on, not the taxpayer. The Court rejected the state's legal incidence argument and focused instead on the fact that the economic burden of the tax was passed on to the tribe, interfering with the tribal interest of building more schools. 458 U.S. at 844, n. 8; *see also*, 458 U.S. at 855-856 (Rehnquist, J., dissenting). In *Ramah*, the Court was not presented with, or did not find, adequate governmental services provided to the tribe by the state, particularly in light of the closing of the state school for reservation children. Cotton misinterprets *Ramah* here to limit the state tax to benefits provided the taxpayer since the taxpayer bears the burden of paying the tax. This interpretation misconstrues the special Indian preemption doctrine as benefitting non-Indian taxpayers rather than tribes.

[31]Because Indians are citizens of the United States (8 U.S.C. § 1401), they are entitled to the protections of the Equal Protection Clause of the United States Constitution and all benefits, services and privileges provided to New Mexico's non-Indian citizens must be provided to Indians. *Iowa Mutual Insurance Co. v. LaPlante*, 107 S. Ct. 971, 977, n. 10 (1987); *Goodluck v. Apache County*, 417 F.Supp. 13 (D. Ariz. 1975) *aff'd mem.*, 429 U.S. 876 (1976).

dren attend state-funded public schools.[32] Even the Jicarilla Apache Tribe, one of the wealthiest, does not fund its education program but relies on the state-funded local public school. Indian health care, once completely supported by the federal government, has now evidently become a state responsibility, at least for indigent Indians, under recent case law.[33] The world described in *Warren Trading Post* simply no longer exists. When the states are told that the financial burden they bear providing governmental services to the reservation somehow cannot be considered to justify their taxing non-Indian business activity on that very reservation, they justifiably feel aggrieved. (*See Amicus Brief* of San Juan County, *et al.*, Utah.)

The nub of the issue is a single question: Is the reservation part of the state or is it not? When it comes to taxing on the reservation, the answer by Cotton and several *amici* is no, the reservation is not part of the state. But when it comes to spending for the reservation, to providing schools, roads and health care, as well as access to universities, parks, courts and all other government services tribal members use, the answer is most emphatically yes, the reservation is part of the state and tribal members are citizens entitled under the 14th Amendment to all state services and benefits. The double standard is unfair and leads to resentment.

[32]A recent BIA report reveals that "for 90 percent of all Indians in the United States, however, Indian education today is public school [not BIA funded] education." Report on BIA Education, Final Review Draft, Bureau of Indian Affairs, U.S. Department of Interior, March 1988, p. 35. Even in New Mexico, where most Indians still live on reservations, the public schools served about 72 percent of all elementary and secondary school Indian students in 1986. *Id.*, pp. 25-35. Virtually all the Jicarilla Apache children attend the state-supported local public school in Dulce, New Mexico. Tr. 198.

[33]*McNabb* v. *Bowen*, 829 F.2d 787, 794-795 (9th Cir. 1987) ("Congress did not intend that the federal government be exclusively responsible for Indian health care. It contemplated that the IHS [Indian Health Service] would aid Indians in taking advantage of state and local programs, with the federal government meeting health care needs not met under those programs.")

The more reservations are considered to be separate jurisdictions outside state taxing power, the more the underlying rationale for Indians' state citizenship and consequent entitlement to state services and financial benefits weakens. The political consequence will be that financially-strapped legislatures, already prohibited from taxing Indian property and income, will hardly be encouraged to increase state funding for services and benefits on the reservation, as Jicarilla President Atole seeks. Tr. 436. A strong affirmation that state expenditures benefitting tribal Indians constitute the state interest in taxing will better fulfill two concerns of the Court and of the tribes. First, it will allow tribes the ultimate sovereignty of choosing to separate themselves from states by taking care of their own needs. If a tribe wants to be treated like an autonomous region, it can provide governmental services for itself (including education and road construction and maintenance), thereby relieving the state of its burden of providing these services and removing the primary justification for state taxation.[34] Secondly, such a standard will encourage state legislatures to fulfill their obligations to provide services to those reservations where tribes are willing to accept state service.

Cotton suggests that the appropriate state interest to justify a tax on reservation activity is the provision of services to a taxpayer of a value equal to the amount of the taxes collected. This assessment for benefit standard flies in the face of basic tax theory[35].

[34]No matter what the tribes do, however, under current law the state still would have to make available to tribal members as state citizens all state services. Thus, even if the tribe provided its own schools, any tribal student could still choose to attend the state school.

[35]See testimony of Dr. James Papke, Professor of Economics and Public Finance at Purdue University's Graduate School of Management and Director of the Center for Tax Policy Analysis at Purdue, Tr. 314-317, and Dr. Gerald Boyle, former Director of Fiscal Analysis for the U.S. Bureau of the Budget, Tr. 383-386.

and 100 years of Court precedent.[36] The practical problems computing Cotton's dollar-for-dollar proposal range from nightmarish to ridiculous. The value of roads, markets, an educated workforce, and courts to Cotton far exceeds the state's expenditures on these services, but is impossible to quantify. The amount of taxes Cotton pays and the need for state expenditures (especially for capital projects) that benefit the reservation will fluctuate widely year to year. Are the state's taxes to be valid one year and invalid the next, depending on the results of Cotton's equation? Surely, the Court does not intend to send trial courts across the land into this legislative thicket.

> In essence, appellants ask this Court to prescribe a test for the validity of state taxes that would require state and federal courts, as a matter of constitutional law, to calculate acceptable rates or levels of taxation of activities that are conceded to be legitimate subjects of taxation. This we decline to do.

Commonwealth Edison Co. v. Montana, 453 U.S. 609, 628 (1981).

[36]The Court has consistently upheld the economic analysis of taxes Papke and Boyle described at trial. A tax is a legislative attempt to raise money for public purposes and to divide the cost of government among those who benefit from it and consequently must bear the burden of it. *Loan Association v. Topeka*, 87 U.S. 655 (1874); *Welch v. Henry*, 305 U.S. 134 (1938). Taxes are not in the nature of debts nor are they the product of any sort of contractual agreement between the providers of public services and the beneficiaries. *Meriwether v. Garrett*, 102 U.S. 472 (1880); *Lane County v. Oregon*, 74 U.S. 71 (1868). Above all, taxes are not an assessment of benefits. *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981); *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S.Ct. 1232 (1987); *Carmichael, et al. v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937); *Thomas v. Gay*, 169 U.S. 264 (1898).

As stated in *Carmichael*, 301 U.S. at 522, "the only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by devotion of taxes to public purposes. . . . [A]ny other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good."

Moreover, any such limitation is grossly inequitable unless the Court is willing to be evenhanded and relieve the state from the obligation to furnish services beyond the value of taxes collected from taxpayers on reservations. The Jicarilla Apache Reservation is an anomoly due to its small population and large oil and gas resources. Most reservations are more like the Zuni Pueblo where the state spends over $2 million annually but receives virtually nothing in tax receipts. Tr. 385-386; State Exhibit N, Table 2.

Cotton's proposal to limit the state tax to the benefit it receives will harm tribal members and every other state citizen so that Cotton can further increase its profit. Nothing in *Ramah* justifies this kind of narrow reading of the state interest.

2. *Ample State Services Provided the Tribe Justify the State Tax.*

The state proved and the court below found that New Mexico provides substantial benefits to members of the Jicarilla Apache Tribe, spending approximately $3,000,000 per year on the Jicarilla Apache Reservation itself. Findings ¶ 12, J.S. App. 16. The District Court specifically found that:

> The state per capita spending per Jicarilla member is equal to or greater than the per capita spending on non-Indian citizens. The state does not discriminate against the Jicarilla Reservation nor its members in respect to state expenditures.

Findings ¶ 13, J.S. App. 16.[37] The record clearly supports

[37]The Jicarilla Apache Tribe's accusation in its Brief *amicus curiae* that New Mexico discriminates against the tribe in the distribution of state education funds is incorrect and appears to be an effort to inflame the Court. It was the fear of this type of misrepresentation of fact—not tested by cross-examination and not a part of the record in this case because the tribe chose not to be a party—that motivated New Mexico not to consent to the tribe's filing a brief as *amicus* in this case.

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the state's crucial role in providing the following services on and off reservation that benefit Jicarilla Reservation residents: free elementary and secondary public schools, reduced-tuition public state universities, state roads (both

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The Jicarilla accusation is based upon an incomplete reading of the very statute it cites and a misunderstanding of Federal Impact Aid, 20 U.S.C. §§ 236-241, the largest share of P.L. 81-874 funds received by the Dulce School District. Federal Impact Aid is provided to local school districts to ensure a sufficient level of public school funding by compensating them for the loss of property tax revenues caused by the location in the district of non-taxable federal land, such as a military base, Indian reservation or national park. 20 U.S.C. § 236. The funding formula calls for the federal government to consult with the state to approximate what local school funding would have been, absent the federal presence, essentially by determining per capita expenditures of otherwise comparable districts that have no federal presence. 20 U.S.C. § 238(d)(3). This "local contribution rate" is multiplied by 125 percent and then multiplied by the number of children residing on Indian reservations who are in attendance in that district to arrive at the federal payment to that district. 20 U.S.C. § 238(d)(2)(D).

In the 1985-86 school year, the total per capita funding for Dulce School District students (90 percent of whom live on the Jicarilla Reservation) was $3,042, as compared with a statewide average of $2,829. In Dulce, a little under 50 percent of these funds came from the federal government and a little over 50 percent from state and local sources. The tribe accuses the state of discrimination because the state has used the federal funds to replace, instead of supplement, some state aid, allegedly in violation of federal law. But 20 U.S.C. § 240(d), governing payments of Federal Impact Aid, specifically allows states to take these federal payments into account when their program of state aid is "designed to equalize expenditures for free public education among the local educational agencies of that state." New Mexico's state aid is designed to equalize expenditures among school districts (N.M. Stat. Ann. §§ 22-8-14 and 25 (1978)), its applications for federal funds were approved by the federal government, and its state aid does not discriminate against Jicarilla children. Compare 1985-86 total per capita expenditures for Dulce of $3,042 with such other federally-impacted *non-Indian* school districts as Alamogordo ($2,878), Clovis ($2,512) and Las Cruces ($2,593). The source of these figures is the same as is relied upon by the Jicarilla Tribe, "Statistics," published by the New Mexico Office of Education, Department of Finance and Administration, published December, 1986.

on the reservation and connecting the reservation to commercial centers), special state police oil and gas patrol, regular highway police, the availability of state courts, state parks, state oil and gas conservation regulation and enforcement, and public health services. *See, e.g.*, state witnesses: Tr. 362, 364, 373, 374, 381-382, State Exhibit N-Table 1 (359 *et seq*); Cotton's witnesses: Tr. 79-84, 125-128, 255-259, 264-266, 269-270, 285-289, 292.[38]

Moreover, New Mexico believes this recitation of services provided tribal members radically understates the state services that actually benefit the tribe. The Jicarilla Reservation is not self-sufficient. The Bureau of Indian Affairs superintendent of the Jicarilla Agency, testifying as Cotton's witness, stated that the tribal members living on the reservation must go off the reservation to obtain most basic goods and services for their families. Tr. 107-109; Findings ¶ 15, J.S. App. 16. Thus, numerous general state government services provided off reservation inure

[38]Through selective use of data Cotton tries to create the impression that New Mexico provides few or no services that benefit the reservation. But there are several problems with Cotton's approach. First, the fact that the federal government expends a great deal of money providing the tribe services above and beyond those normally provided by government, e.g. cradle-to-grave health care, does not mean New Mexico is not providing basic governmental services. Second, with only 2,500 Jicarilla members living on the reservation, using aggregate instead of per capita data distorts reality. Per capita figures show that New Mexico spends as much or more per capita for reservation members as it does for its citizens at large. Findings, ¶ 13, J.S. App. 16. Third, Cotton's repeated recitation of misleading numbers does not make them true. Cotton either ignores or downplays the substantial services described in this brief. Fourth, Cotton distorts the record. Douglas Wood, Cotton's Denver Division Production Manager who goes to the reservation "about twice a year," Tr. 36, was asked if he had occasion to have the state make visits during the drilling process. He replied, "Not that I'm personally aware of." Tr. 45. From this testimony, Cotton claims "that during the last ten years not one of the Cotton employees has ever seen a New Mexico oil and gas supervisor or policy enforcement officer on the Reservation to supervise drilling or review oil and gas drilling operations. (Tr., Vol. 1, p. 45)." Cotton Brief, p. 21, n. 7.

to the benefit of the tribe. The very availability of off-reservation goods and services depends in part on state expenditures for roads, for police and fire protection and for maintenance of high standards through licensing and regulation of products and professionals. Finally, Jicarilla economic development in general depends on New Mexico to provide an educated workforce, professional government, a fair and efficient legal system, and all the other public sector elements of economic markets. Tr. pp. 374-376. The collection of revenue sufficient to pay for all the benefits of living in New Mexico provided to the Jicarilla Apaches more than justifies whatever conjectural impact state taxation of Cotton may have on federal and tribal interests.

Even if one focuses on services that benefit the Jicarilla's oil and gas production, rather than the tribe as a whole, New Mexico provides most of the government services that render that production possible. Cotton's Denver Division Production Manager Douglas E. Wood admitted that Cotton could not operate on the Jicarilla Reservation without services and equipment derived off reservation. Tr. 52-55, 80-85. Thus, Cotton's extensive operations (indeed, all oil and gas production on the Jicarilla Reservation) rely to a great extent on a broad range of services provided by the state both on and off the reservation. Cotton's Brief, p. 9. These services include construction and maintenance of state roads used to transport workers and equipment to the oil sites on the reservation and to transport oil off the reservation to be refined; police patrols on these roads; schools to educate and train Cotton's workers and contractors, all of whom live off the reservation; recreational facilities; the state courts that Cotton would use to resolve disputes with its workers, contractors or suppliers; and the state Energy and Minerals Department's regulation of spacing and mechanical integrity of wells located on the Jicarilla Reservation. Findings ¶¶ 4, 14, 15 and 17, J.S. App. 15-16. Thus, in weighing state services, New Mexico should be allowed to put on the scales all the costs of providing these

services plus those of providing economic markets, an educated workforce and a professional government. As the District Court put it, after hearing all the evidence: "The state also provides the benefits of living in an organized society to Cotton and the tribe." Findings ¶ 12, J.S. App. 16.

For all of these reasons, New Mexico believes that if the Court does look to the state interest at stake, it should recognize and evaluate that interest most comparable to the federal and tribal interests placed on the other side of the balance. Under the analysis of the facts pursuant to the test as set forth above, New Mexico's taxation of Cotton Petroleum Corporation is not preempted by federal law.

III. THE COMMERCE CLAUSE DOES NOT RENDER THESE STATE TAXES ILLEGAL.

A. Concentric Sovereigns May Each Tax Activity Within Their Respective Jurisdictions.

Cotton and several of its *amici* argue that New Mexico's taxes violate the commerce clause because of the multiple tax burden imposed by tribal and state taxes. None presents a traditional Commerce Clause analysis[39] or a coherent new theory. They intermix references to the In-

[39]Under traditional Interstate Commerce Clause standards, this case is identical to *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) in satisfying the four prongs of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). There are no *nexus* or *apportionment* problems because the entire severance occurs within New Mexico. The New Mexico taxes do not *discriminate* against interstate commerce because it is "computed at the same rate regardless of the final destination" of the oil and there is no "differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases." *Commonwealth Edison*, 453 U.S. at 618. Finally, New Mexico's taxes are *fairly related* to the services it provides. To paraphrase the Court in *Commonwealth Edison*, "The 'operating incidence' of the tax . . . is on the mining of [oil] within [New Mexico]. Because it is measured as a percentage of the value of the [oil] taken, the [New Mexico] tax is in 'proper proportion' to appellants' activity within the state and, therefore, to their 'consequent enjoyment of the opportunities and protections which the State has afforded' in connection with those activities." 453 U.S. at 626.

terstate and the Indian Commerce Clauses. Some treat the Jicarilla Apache Reservation as a separate state; others simply as a jurisdiction apart from New Mexico. Treating New Mexico and the Jicarilla Reservation as mutually exclusive jurisdictions then allows Cotton to raise a series of alleged problems that seem to implicate the Commerce Clause. Ultimately, the various Commerce Clause arguments rest on four allegations: (1) Cotton's severance lacks substantial nexus with New Mexico because that severance occurs outside the state; (2) the combined New Mexico and Jicarilla taxes require apportionments; (3) New Mexico's taxes are not fairly related to services the state provides; and (4) the state tax discriminates against commerce (interstate or Indian) because the multiple tax burden is greater for reservation severance than for nonreservation severance. In discussing these issues of nexus, apportionment, fair relation and discrimination, Cotton and its *amici* refer sometimes to Interstate Commerce Clause standards under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), sometimes to Indian Commerce Clause standards under *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 132 (1980), and sometimes to Foreign Commerce Clause standards under *Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).[40]

[40]The suggestion by Cotton's *amici* that the *Japan Lines* interpretation of the Foreign Commerce Clause provides an analogy for treatment of Indian commerce fails in this arena where Congress can fully control all taxing jurisdictions. The basis for the Court's decision in *Japan Lines* rested on Congress' inability to "eliminate the threat of multiple taxation and ensure full apportionment when one of the taxing entities is a foreign sovereign." 441 U.S. at 447. Even though Los Angeles County properly apportioned its tax, Japan did not, and there was no "authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value." *Id.* No such incapacity exists in relation to taxes on Indian reservations. Congress can control both state and tribal taxes and ensure fair tax treatment.

Nor does the second standard adopted in *Japan Lines*—"whether the tax prevents the federal government from 'speaking

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What all the opposition briefs fail to acknowledge is that the alleged "multiple taxation" involved here is conceptually different from that which raises Commerce Clause issues. It is no more than the imposition of tax by the several governments that all have jurisdiction over the location of Cotton's business. Cotton's wells are within the state, the tribal reservation and the United States. All three jurisdictions impose taxes on Cotton as they do on every company that does business within their jurisdictions. Each such overlapping or "concentric" sovereign is free to tax in a nondiscriminatory manner subject only to the oversight of Congress and limitations imposed by this Court through the Indian preemption analysis.

This Court has dealt with combined state and tribal taxes on only two occasions and both times has confirmed this concentric sovereign approach. In *Colville*, the Court discussed the Washington state tax and tribal taxes on cigarette sales and found that, "There is no direct conflict between the state and tribal [taxing] schemes, since each government is free to impose its taxes without oust-

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with one voice when regulating commercial relations with foreign governments' "—apply to Indian commerce. *Japan Lines*, 441 U.S. at 451. Again the problems arise from lack of total federal government control over the third player—a foreign sovereign involved in this commerce. The Court foresaw that "international disputes over reconciling apportionment formulas may arise" and that "foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities." *Id.* at 450. Neither of those problems can occur where Congress and this Court have ultimate authority to ensure resolution of these disputes. Both tribes and states are dependent sovereignties under control of the federal government. The control exerted by Congress through legislation pursuant to the Indian Commerce Clause and by this Court under the special Indian preemption analysis inevitably ensures that the federal government speaks with one voice, but one more sensitive to the federal, tribal and state interest at stake than a bright line rule that forbids any state involvement where Indian commerce is involved. The Foreign Commerce Clause standard is not helpful here and should not be read into the Indian Commerce Clause.

ing the other." 447 U.S. at 158. In *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982), the Court, in reaffirming its holding in *Colville,* cited the "settled principles of taxation: different sovereigns can enjoy powers to tax the same transaction. Thus the mere existence of the state authority to tax does not deprive the Indian tribe of its power to tax." 455 U.S. at 151.[41] *See also Southland Royalty Co. v. Navajo Tribe of Indians,* 715 F.2d 486, 490-491 (10th Cir., 1983).

The recognition of the right of concentric sovereigns to tax does not mean that the additional burden of the state tax will always be legitimized. The Indian preemption analysis will strike down a state tax which substantially interferes with a congressionally mandated policy or tribal sovereignty without a sufficiently strong justifying state interest. *White Mountain,* 448 U.S. 136 (1980); *Ramah,* 458 U.S. 832 (1982). The protection is for the tribe, however, not the taxpayer.

B. Cotton's Severance Has Nexus with Both the State and the Tribe.

The major premise of Cotton's Commerce Clause argument is that the Jicarilla Reservation, and not the state, has jurisdiction based on nexus to tax activity taking place on the reservation. Cotton simply assumes that the Jicarilla Reservation is outside the state of New Mexico. It neither discusses nor analyzes the specific question posed by this Court in noting probable jurisdiction—"Does the Commerce Clause require that an Indian tribe be treated as a state for determining whether a state tax on nontribal activities conducted on a reservation must be apportioned to account for tribal taxes imposed on the same activity?"[42] Cotton cites no precedent to support treat-

[41]The Court cited for support the case of *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977), which approved the country possessory interest tax on non-Indian lessee property on the reservation in the face of a tribal challenge.

[42]The implication of the Court's question about treating the tribal reservation as a state is essentially the same as Cotton's

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ing the reservation as a state for Commerce Clause purposes.

The language and history of the Commerce Clause make clear that Indian tribes and states are to be treated differently with respect to the regulation of commerce. Article 1, Section 8, Clause 3 of the United States Constitution gives to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." The "plain meaning" of this clause indicates that the power conferred to regulate commerce among the states was distinct from that to regulate commerce with the Indian tribes. *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 17-18 (1831).[43] Moreover, the purposes of the Interstate and Indian Commerce Clauses are vastly different. The objective of the Interstate Commerce Clause is to create an area of free trade among the several states. The Indian Commerce Clause has the quite different objective of preserving to Congress control over trade with Indian tribes.

Not only do the origin and purposes of the Commerce Clause refute treating reservations like states, but consistent modern precedent refutes Cotton's argument that

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argument that the tribe alone has jurisdiction based on nexus over activity taking place on its reservation—both treat the reservation and state as mutually exclusive jurisdictions. The essence of the relationship between two states under the Commerce Clause is that a transaction or piece of property can have nexus with only one state at the same time. Thus, although a railroad car that moves between New Mexico and Arizona can have nexus with both states it has nexus with New Mexico only while the car is within its territory, and the same for Arizona; the railroad car cannot be in both jurisdictions at once. This is not so with Cotton's reservation oil.

[43]As summarized by Professor A. Abel in "The Commerce Clause in the Constitutional Convention and in Contemporary Comment," 25 Minn.L.Rev. 432, 468 (1941):

> Whatever regulation of commerce might mean in connection with transactions with the Indians, it was so distinct and specialized a subject [at the Constitutional Convention] as to afford no basis for argument as to the meaning of the rest of the clause.

activity on the reservation has no nexus with the state. The entire development of the special Indian preemption analysis from *Warren Trading Post* to *Cabazon* is premised on the proposition that the state does have jurisdiction to tax non-Indians' activity on the reservation and may tax, unless preempted by congressional action. Under Cotton's no-nexus theory, each of those opinions would have been one sentence long—simply "the state has no jurisdiction to tax on-reservation activity." To the contrary, these cases all recognize that the view of Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832), that tribal reservations are completely separate from states, is no longer valid. "Long ago the Court departed from Chief Justice Marshall's view that 'the laws of [a state] can have no force' within reservation boundaries." *White Mountain*, 448 U.S. at 141. *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 173 (1973). Tribal members have full rights as state citizens[44] and receive substantial benefits therefrom. See Section II(D)(2), above. To return to an analysis that places Indian reservations and their members separate and apart from states would undo those precedents. Clearly, the tribes seek no such separation. Indian *amici* are unanimous on this point and all agree that reservations are *not* to be treated as states for Commerce Clause analysis.

As a practical matter, to treat tribes as states for Commerce Clause purposes would, of necessity, raise fundamental questions about the sovereignty of tribes in relation to the sovereignty of states and create a nightmare of jurisdictional and citizenship questions that no tribe desires.[45] Any reweaving of the political fabric of this

[44]See footnote 31.

[45]If the Jicarilla Apache Reservation is not part of New Mexico but a separate state for purposes of determining which government has jurisdiction to tax severance within the reservation,

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magnitude must be left to Congress. Tribal reservations cannot sensibly or coherently be treated as states.

Since the reservation cannot be treated as a true state, in the sense of being a mutually exclusive jurisdiction from New Mexico depriving New Mexico of jurisdiction to tax, is there any way the reservation can be seen as a state in some more limited sense under the Commerce Clause? To attempt such a conceptualization inevitably contradicts the fundamental basis of any Commerce Clause driven requirement of apportionment. The Court has always regarded nexus as the touchstone and source of apportionment. Where an activity takes place entirely within a jurisdiction, no apportionment problems surface. *Commonwealth Edison*, 453 U.S. at 617. Because the severance here occurs wholly within both jurisdictions, concepts of apportionment derived from the Commerce Clause analysis do not apply.

C. No Apportionment of New Mexico Taxes is Required Where the Activity Taxed Occurs Entirely Within the State.

Although several briefs call for the apportionment of these New Mexico taxes, none provides a satisfactory theoretical basis for such apportionment nor a precedent to justify it. The need for apportionment arises only when a state seeks to tax an activity or property, part of which occurs or is present outside its borders in another state.[46] Apportionment has always been measured by the

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would reservation members still be considered New Mexico state citizens entitled to attend state schools and vote in state elections? Are we really ready to create more than 250 new states from the tribal reservations? Would these new states then assume the obligation of each of the current 50 states to provide benefits and services to tribal members? Would tribes, by becoming states, surrender their power to exclude nonmembers and their other extraordinary powers?

[46]This apportionment concept was employed early in property tax cases. Certain moveable property was located within a

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degree of nexus or contact with the state. Where the activity taxed has contact with only one state, no apportionment is required. *Commonwealth Edison*, 453 U.S. at 617.

Each concentric sovereign has contact with one hundred percent of the transaction occurring wholly within its boundaries. Therefore, an activity occurring within the jurisdictions of concentric sovereigns has never been subject to apportionment. The state and federal governments do not apportion a citizen's income for tax purposes; both governments tax the full amount of the income. Similarly, both federal and state governments tax one hundred percent of the value of gasoline and tire sales.

On what basis could apportionment of taxes imposed by concentric sovereigns be implemented? Cotton suggests that the Court apportion by determining the benefit each sovereign provides the taxpayer. This proposed standard echoes the argument in *Commonwealth Edison* that the fourth prong of *Complete Auto Transit* (the "fairly related" prong) requires the Court to make "a

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state for some period of time (providing nexus) but out of state for other periods. States were limited in taxing that property according to the extent of their contact. *Johnson Oil Ref. Co. v. Oklahoma*, 290 U.S. 158 (1933). Similarly, in evaluating the portion of fixed property of an interstate business, such as a railroad located within a single state, the state may, under the unit method, value the business' entire property to determine the synergistic value of the portion within the state, but then must apportion that full value to reflect the percentage of property within the taxing state. *Illinois C.R. Co. v. Minnesota*, 309 U.S. 157, 164 (1940); *Nashville, C. & St. Louis Railway Co. v. Browning*, 310 U.S. 362, 365-366 (1940). Finally, a similar apportioned percentage of total value is employed to determine a state's fair share of the total income of an interstate unitary business for income tax purposes. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458-463 (1959) (". . . the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the states for tax purposes by formulas using in-state aspects of interstate affairs. . . ." *Id.* at 460.) In every case, the in-state contact with the activity taxed drives the apportionment.

factual inquiry into the relationship between the revenues generated by a tax and the costs incurred on account of the taxed activity." *Commonwealth Edison*, 453 U.S. at 627. The Court recognized the impossibility of such a role and rejected it. "This we decline to do." *Id.* at 628. Any apportionment of taxes by concentric sovereigns based on benefits to the taxpayer should be left to Congress, not the courts, to decide.

Cotton and its *amici* also suggest that apportionment could be achieved by requiring the state to grant a tax credit for any tribal taxes imposed. In effect, the tribes would immediately oust all state taxes on reservation activity by imposing their own taxes. This Court previously has held, however, that tribes do not have the power to preempt state taxes unless authorized by Congress.[47] No such authorization exists here. Again, such fundamental reworking of state revenue sources is a matter for Congress.

D. New Mexico's Taxes are Fairly Related to Services Provided Cotton.

Cotton claims that New Mexico's taxes are not "fairly related to the services provided by the State" to Cotton. This requirement is the elusive[48] fourth prong of the *Com-*

[47]In responding to the argument that the tribal cigarette taxes in *Colville* preempted the state tax, the Court stated:

> . . . although the Tribes themselves could perhaps pre-empt state taxation through the exercise of properly delegated federal power to do so [citations omitted], we do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe. . . .
>
> . . . we perceive no intent on the part of Congress to authorize the Tribes to preempt otherwise valid state taxes.

Colville, 447 U.S. at 156, 158.

[48]See Jerome R. Hellerstein, *State Taxation*, Vol. 1, pp. 155-156.

plete Auto Transit test. 430 U.S. at 279. In *Commonwealth Edison,* the Court recognized that this requirement "is closely connected to the first prong of the *Complete Auto Transit* test . . . the interstate business must have a substantial nexus with the State." 453 U.S. at 626. Indeed, Cotton's argument runs essentially that since its severance occurs on the reservation and not in the state, the state is not the government which provides services to Cotton to justify the state tax.[49]

As explained above in Section III(B), Cotton's severance most definitely has nexus with the state. All that the fairly related prong requires is that New Mexico provide Cotton the benefits of "living in an organized society." *Commonwealth Edison,* 453 U.S. at 623, quoting *Carmichael v. Southern Coal and Coke Co.,* 301 U.S. 495, 522 (1937). The fact that the severance occurs on the reservation as well as within New Mexico does not alter the fact that New Mexico is the primary provider of "an organized society" for Cotton. The evidence at trial amply proved that Cotton is much more dependent on state-provided services for its business than on services provided by the tribe. What Cotton needs for its business is a trained workforce, markets and access to markets, every bit of which is provided by New Mexico. See discussion above at Section II(D)(2). Cotton's assertion about the amount of money the tribe spends on oil and gas regulation is disingenuous. The great bulk of tribal expenditures does not help Cotton conduct its business but funds regulation of the industry which costs Cotton money.[50] Cotton could

[49]Cotton even tries to ressurect the theory that a "State's power to tax an activity connected to interstate commerce cannot exceed the value of the services specifically provided to the activity," which this Court totally rejected in *Commonwealth Edison,* stating that "The premise of appellant's argument is invalid." 453 U.S. at 621.

[50]Douglas Wood testified that "we have to operate these leases probably more stringently than we do any other federal leases because it is an Indian Reservation. There are numerous

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operate without the benefit of any tribal government services. But it could not operate without state services.

E. New Mexico Taxes do not Discriminate Against Interstate or Indian Commerce.

Cotton and several *amici* claim that New Mexico's taxes discriminate against either interstate or Indian commerce. Although not clearly articulated, Cotton alleges the discrimination results from "unlawful practical effect," because the combined federal, state and tribal taxes impose a greater tax rate on severance from the reservation than on severance from nonreservation areas.

Cotton is alleging nothing more than that by choosing to do business in an area where concentric taxing governments impose higher taxes, its costs of doing business will inevitably be greater than if it had located in jurisdictions imposing lower taxes. This is not the kind of "differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases." *Commonwealth Edison,* 453 U.S. at 618. The cases cited by Cotton and *amici* do not support Cotton's "unlawful effect" discrimination argument. Rather they reflect the traditional Commerce Clause discrimination standard that voids a state's attempt to benefit local businesses or consumers over out-of-staters, either through differential taxes on instate and out-of-state business or by credits or exclusions.[51]

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rules that we have to adhere to." Tr. 46-47. See Appendix B to the Jicarilla Apache Tribe's Amicus Brief for a list of bureaucratic regulations that can hardly be said to facilitate Cotton's operations.

[51]Thus, Cotton's reliance on *Maryland v. Louisiana,* 451 U.S. 725 (1981), is misplaced. The Court there struck down Louisiana's First Use Tax on gas because it "unquestionably discriminates against interstate commerce in favor of local interests as a necessary result of various tax credits and exclusions." *Id.* at 756. The Louisiana taxing scheme protected Louisiana consumers while taxing those in other states:

> Louisiana consumers of OCS [Outer Continental Shelf] gas are thus substantially protected against the impact of the

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New Mexico's severance taxes do not discriminate against commerce. They are imposed at the same rate, on and off the reservation,[52] no matter what the origin or destination of the oil. No credits or exclusions benefit businesses or consumers from New Mexico over out-of-state businesses or consumers. The "economic disadvantage" of which Cotton complains results simply from Cotton's doing business in a location with a higher level of taxes.

The fact that Cotton is doing business on an Indian reservation imposes no higher or different discrimination standard. The Court in *Colville* recognized that the dormant Indian Commerce Clause is not an automatic bar to state taxation on the reservation but has a much more limited function, analogous to the dormant Interstate Commerce Clause, in preventing undue discrimination against, or burdens on, Indian commerce.

> It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. . . . [citation omitted] That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian Commerce.

Colville, 447 U.S. at 157.

The kind of "undue discrimination" referred to in *Colville* is direct discrimination against Indian Commerce,

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> First Use Tax and have the benefit of untaxed OCS gas . . . . OCS gas moving out of the state, however, is burdened with the First Use Tax.

Id. at 757-758. Similarly, the Court struck down the tax in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), and the credits in *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. —, 107 S. Ct. 2810 (1987), and *New Energy Co. v. Limbach*, 108 S. Ct. 1803 (1988), because they favored in-state businesses over out-of-state ones.

[52]Except, of course, that New Mexico's severance taxes are not imposed on severance by the Indian tribes, or on their income from lessees' severance.

such as where state taxes would be applied differently to activities off reservation from those on reservation. In *Colville*, the Court found no discriminatory aspect to the state cigarette tax because it was applied uniformly throughout Washington. "Washington's taxes are applied in a nondiscriminatory manner to all transactions within the state." *Colville*, 447 U.S. at 157. New Mexico's severance taxes also are applied uniformly throughout the state to the severance of all oil and gas.

Nor did the Court in *Colville* find persuasive the tribe's argument that the combined state and tribal reservation taxes placed cigarette retailers at a competitive disadvantage by not requiring a state credit for the tribal tax. Although the Court realized that such a multiplicity of taxes could burden on-reservation businesses, it noted that, as a factual matter, no significant burden was shown. Similarly, in this case, although the combined state and tribal tax burden could, if the tribal tax were high enough, discourage mineral lessees from doing business on the reservation, as a factual matter no such discouragement was shown.

This Court has abjured an absolutist approach to the use of the dormant Indian Commerce Clause, preferring instead the more sensitive analysis provided by the special Indian preemption standard.[53] Thus, in *Ramah*, the Court rejected the Solicitor General's suggestion that the dormant Indian Commerce Clause provides a presumption against state taxes on the reservation:

[53]Cotton itself notes the patent inconsistency of the dormant commerce and preemption arguments. Preemption requires either an explicit enactment or such comprehensive federal regulation as to preclude state involvement. Dormant commerce clause analysis is invoked only in the *absence* of governing acts of Congress. *Merrion*, 455 U.S. at 154 ("Once Congress acts, courts are not free to review state taxes . . . under the dormant Commerce Clause."). The dormant Commerce Clause analysis is not appropriate here where the state's authority to tax is specifically granted in the 1927 Act and the only issue is whether that authority was repealed or preempted by the 1938 or subsequent acts.

> We do not believe it necessary to adopt this new approach [reliance on the dormant Indian Commerce Clause to presumptively invalidate state tax on on-reservation activity]—the existing pre-emption analysis governing these cases is sufficiently sensitive to many of the concerns expressed by the Solicitor General.

Ramah, 458 U.S. at 846. Any concern that the combined tribal and state taxes might work a disadvantage to tribal commerce is inevitably resolved through the preemption analysis. It is a more sensitive and flexible method of determining whether state taxation does in fact harm federal and tribal interests beyond that which would be justified by state interest.

CONCLUSION

For all of the reasons set forth above, the decision of the New Mexico Court of Appeals should be affirmed.[34]

Dated August, 1988.

Respectfully submitted,

HAL STRATTON
Attorney General
HENRY M. BOHNHOFF
Deputy Attorney General
GEORGE W.K. SNYDER, JR.
Assistant Attorney General

FRANK D. KATZ
DANIEL YOHALEM*
DEBORAH A. MOLL
Special Assistant
Attorneys General
New Mexico Taxation and
Revenue Department
P.O. Box 630
Santa, Fe, NM 87509-0630
Tel. (505) 827-0730

Counsel for Appellees

*Counsel of Record

[34]Should this Court decide this appeal in favor of Cotton, its decision will necessarily involve new legal principles under the Commerce Clause or the special Indian preemption doctrine. Therefore, New Mexico respectfully requests that the case be remanded to the New Mexico Court of Appeals to address the question of whether the decision should be applied prospectively. *Cf. Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S. Ct. 2810, 2822-2823 (1987); *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2847-2848 (1987). As in *Tyler Pipe*, Cotton is seeking a refund of taxes paid. New Mexico believes that the state court should be given an opportunity to explore the factors relating to nonretroactivity (as set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971)) in this "complex area of state tax structures" before this Court considers the question. *Tyler Pipe*, 107 S. Ct. at 2822.

APPENDIX

Additional Federal Statutes Involved*

1. Act of March 3, 1927, 44 Stat. 1347.

   25 U.S.C. § 398a. Leases of unallotted land for oil and gas mining purposes within Executive order Indian reservations.

   > Unallotted land within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribes may be leased for oil and gas mining purposes in accordance with the provisions contained in Section 398 of this title.

   25 U.S.C. § 398c. Taxes.

   > Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservation in the same manner of such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided,* That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

2. Crude Oil Windfall Profits Tax Act of 1980, P.L. 96-223, 94 Stat. 229.

   26 U.S.C. § 4986(a). Imposition of Tax.

   > An excise tax is hereby imposed on the windfall profits from taxable crude oil removed from the premises during each taxable period.

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*The statutes are cited in relevant part only.

*26 U.S.C. § 4987. **Amount of Tax.***

(a) ***In general.***—The amount of tax imposed by section 4986 with respect to any barrel of taxable crude oil shall be the applicable percentage of the windfall profits on such barrel.

(b) *Applicable percentage.*—For purposes of subsection (a).—

(1) *General rule for tiers 1 and 2.*—The applicable percentage for tier 1 oil and tier 2 oil which is not independent producer oil is—

Tier 1 70

Tier 2 60

26 U.S.C. § 4988. Windfall profit; removal price.

(a) *General rule.*—For purposes of this chapter, the term "windfall profit" means the excess of the removal price of the barrel of crude oil over the sum of—

(1) the adjusted base price of such barrel, and

(2) the amount of the severance tax adjustment with respect to such barrel provided by section 4996(c).

26 U.S.C. § 4991. Taxable crude oil; categories of oil.

(a) *Taxable crude oil.*—For purposes of this chapter, the term "taxable crude oil" means all domestic crude oil other than exempt oil.

(b) *Exempt oil.*—For purposes of this chapter, this term "exempt oil" means—

* * *

(2) any exempt Indian oil, . . .

* * *

26 U.S.C. § 4994. Definitions and special rules relating to exemptions.

(d) ***Exempt Indian oil.***—For purposes of this chapter, the term "exempt Indian oil" means any domestic crude oil—

(1) the producer of which is the Indian tribe, an individual member of an Indian tribe, or an Indian tribal organization under an economic interest held by such a tribe, member, or organization on January 21, 1980, and which is produced from mineral interests which are—

(A) held in trust by the United States for the tribe, member, or organization, or

(B) held by the tribe, member, or organization subject to a restriction on alienation imposed by the United States because it is held by an Indian tribe, and individual member of an Indian tribe, or an Indian tribal organization, . . .

* * *

26 U.S.C. § 4996. Other definitions and special rules.

(c) ***Severance tax adjustment.***—For purposes of this chapter—

(1) ***In general.***—The severance tax adjustment with respect to any barrel of crude oil shall be the amount by which—

(A) any severance tax imposed with respect to such barrel, exceeds

(B) the severance tax which would have been imposed if the barrel had been valued at its adjusted base price.

(2) *Severance tax defined.*—For purposes of this subsection, the term "severance tax" means a tax—

(A) imposed by a State with respect to the extraction of oil, and

(B) determined on the basis of the gross value of the extracted oil.

(3) Limitation.—

(A) 15 percent limitation.—A severance tax shall not be taken into account to the extent that the rate thereof exceeds 15 percent.

(B) Increases after March 31, 1979, must apply equally.—The amount of the severance tax taken into account under paragraph (1) shall not exceed the amount which would have been imposed under a State severance tax in effect on March 31, 1979, unless such excess is attributable to an increase in the rate of the severance tax (or to the imposition of the severance tax) which applies equally to all portions of the gross value of each barrel of oil subject to such tax.

REPLY
BRIEF

(9)

No. 87-1327

In The

Supreme Court of the United States

October Term, 1987

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*,
Appellees.

On Appeal From The Court of Appeals of New Mexico

REPLY BRIEF OF APPELLANTS COTTON PETROLEUM CORPORATION, ET AL.

Daniel H. Israel, Esq.*
Daniel H. Israel, P.C.
1100 Stout Street
Suite 850
Denver, CO 80204
Tel. [303] 629-1100

G. Samuel Schaunaman, II, Esq.
Oxy Usa Inc.
P.O. Box 300
Tulsa, OK 74102
Tel. [918] 561-4278

Jane E. Lein, Esq.
Cogswell and Wehrle, P.C.
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Tel. [303] 861-2150

Counsel for Appellants

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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REPLY BRIEF OF APPELLANTS COTTON PETROLEUM CORPORATION, ET AL.

STATEMENT OF THE CASE

Because New Mexico imposes its five oil and gas extraction taxes without abatement on Jicarilla Indian Reservation oil and gas lessees who are subject to two (and since January 1, 1988 now three) Jicarilla tribal oil and gas taxes, such lessees, including Cotton, pay a 75% greater tax burden than do off-Reservation producers. Cotton's on-Reservation taxes approximate 14% of gross value while off-Reservation producers pay approximately 8% of gross value. New Mexico's taxes are assessed on Cotton at the very same level they are imposed on production off the Reservation, even though the record below shows that the Jicarilla Tribe and the United States provide 90% of the governmental services on the Reserva-

tion.[1] Further, New Mexico has refused to reduce its taxes imposed on the Jicarilla Reservation even though the record below confirms that during the period 1981-85, New Mexico extracted oil and gas tax revenues from Reservation producers, including Cotton, which equaled 400% of the estimated state services provided the Reservation.[2]

New Mexico's response to these factual assertions is to distort and confuse the record.[3] Further, New Mexico

[1] Cotton's economist testified and New Mexico's economist did not seriously dispute, that during the period 1981-85 federal and tribal governments expended $76,943,947 for Reservation services and New Mexico and its subdivisions expended $10,704,748. (Cotton Exh. 13, p. 10 (revised)).

[2] Cotton's evidence showed that with respect to its operations during the years 1981-85, New Mexico and its subdivisions provided on and off Reservation services to Cotton and its contractors in an amount calculated to be $89,384 and collected oil and gas severance taxes from Cotton in the amount of $2,293,953. At the same time on a Reservation-wide basis during the period 1981-85, New Mexico and its subdivisions provided total government services in an amount calculated, as noted above, to be $10,704,748 while extracting revenues from Reservation oil and gas production in the amount of $47,483,306 (Cotton Exh. 13, pp. 1, 3, 4, 10 (revised)).

[3] For example, New Mexico claims it is justified in imposing all of its taxes notwithstanding the primary governmental responsibilities of the Tribe and the federal government on the Reservation because the state provides spending on a per capita tribal member basis which is equal to its per capita spending for non-Indians off the Reservation. (New Mexico Brief, p. 2). However, New Mexico's own expert agreed that such a conclusion was "gross error" (Tr., vol. II, pp. 398-99) because it was based on the erroneous assumption that New Mexico's services were calculated only to assist the approximately 1700 Reservation Indians. In fact the state services also benefit off-Reservation residents passing through the Reservation as well as a significant number of on-Reservation residents who are not members of the Jicarilla Indian Tribe. The state also rewrites the record when it claims that the evidence shows that it spends approximately $3,000,000 dollars annually in state services to the Reservation. In fact, the state's own expert agreed with

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ignores the undisputed economic fact of life, conceded by its own experts, that overlapping state and tribal taxes "necessarily" favor off-Reservation development. (Tr., vol. III, pp. 500-02).[4] The presence of overlapping state and tribal taxation contributed to Cotton's decision to limit marginal wells on the Jicarilla Reservation, the site of the company's "least economical production" nationwide. As a result, only low risk infield wells rather than new exploratory wells were drilled. (Tr., vol. I, pp. 67-68).

New Mexico claims that it now carries a substantial governmental responsibility on the Jicarilla Indian Reservation which it and other states did not carry when the Court, in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965), took into account the lack of state responsibilities on the Reservations to set aside an Arizona tax on Indian traders. (New Mexico Brief, p. 27).

(Continued from previous page)

Cotton that state expenditures in reality approximate only $2,000,000 (Tr., vol. II, pp. 359, 394-95). Similarly, the state attempts to shore up its alleged commitment of oil and gas services to the Reservation by attacking the credibility of Douglas Wood, Cotton's division manager. (New Mexico Brief, p. 33 n.38). However, New Mexico ignores the testimony of the Bureau of Indian Affairs officer in charge of oil and gas matters who stated that in his fourteen years on the Reservation he had never seen New Mexico directly involved in *any* oil and gas monitoring or supervision. (*See* Deposition of Harold Tecube at pp. 30-31, stipulated by the parties to be a part of the record and introduced in the testimony of Richard Lotspeich, R., vol. II, p. 227). Finally, New Mexico misleads the Court (New Mexico Brief, p. 32 n.37) when it suggests that state public school contributions are greater on the Jicarilla Reservation than off the Reservation. The record shows, to the contrary, that New Mexico's general fund contribution to the Jicarilla Reservation public schools equals less than one half of its statewide level of support for public schools. (Tr., vol. I, p. 232; Cotton Exh. 13, p. 5).

[4] Not surprisingly, the Court has found that unjustified State of Arizona taxes "necessarily" undermine Congress' economic development policies for the Reservations. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980).

But New Mexico cannot hide from the record which shows that it provides the Reservation only one dollar in services for every four dollars taken in tax revenues off the Reservation. Nor does New Mexico explain why it has systematically spent virtually all of the $19,187,334 in oil and gas severance tax revenues derived from the Jicarilla Reservation from 1981-85 on state and local capital projects located off the Reservation.[5] Finally, New Mexico offers no explanation as to why it should continue to tax Reservation oil and gas production already subject to significant tribal taxation, even though it provides no state court system, no state parks, no state recreation facilities, no state water and sewage projects, no state fire protection, no state public health facilities, and no state university facilities.[6]

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[5] New Mexico claims that the Jicarilla Indians benefited from a 7.7 million dollar expenditure on State Highway 44, but fails to inform the Court that while State Highway 44 crosses the southern edge of the Reservation, it primarily serves non-Indian traffic not doing business on the Reservation, and that the highway construction occurred before the years in question. Moreover, when the state's capital contribution to State Highway 44 is analyzed the way both the Cotton and the state economists agreed was appropriate, it is amortized over twenty years and reflects that less than 25% of the traffic has any contact with the Reservation. With these calculations the annual New Mexico contribution becomes $176,354. (Tr., vol. II, pp. 210, 218). Also, New Mexico ignores the fact that both the Jicarilla Indians and their business partners pay the full quota of highway taxes which support the construction and maintenance of state and federal highways serving the Reservation. *See* 4 U.S.C. § 104; (Tr., vol. II, pp. 205, 208).

[6] *See* Cotton Brief, pp. 9, 10. Because New Mexico's local subdivisions do provide assistance to the Dulce Public Schools located on the Jicarilla Reservation, the two New Mexico property taxes imposed on Cotton's Jicarilla oil and gas production which provide local public school support are not challenged by Cotton (see New Mexico Brief, p. 3). Nor does Cotton chal-

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New Mexico's defense does not focus exclusively on factual misstatements and omissions. New Mexico also suggests that Cotton created its own tax problems by electing to develop oil and gas reserves held in trust by the United States located on the Jicarilla Reservation, and that having made that election it should simply accept the fact that "its costs of doing business will inevitably be greater" than if it had elected to produce off the Reservation. (New Mexico Brief, p. 45). However, this Court's teachings do not support New Mexico's hard line defense. Indeed, as we show below, the Court's preemption and Commerce Clause teachings *both* support Cotton's claim that the New Mexico oil and gas tax burden should be reduced to reflect federal and tribal government primacy on the Jicarilla Reservation as well as New Mexico's sharply reduced responsibilities to the Jicarilla Indians and their Reservation business partners.

ARGUMENT

I. THE COURT'S INDIAN PREEMPTION TEACHINGS SUPPORT COTTON'S CLAIM FOR REDUCED TAXES.

Contrary to New Mexico's belief (New Mexico's Brief, pp. 10-15), Cotton's claims do indeed comport with the

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lenge the small oil and gas conservation tax imposed by New Mexico, in light of New Mexico's ongoing cooperative effort with the Jicarilla Tribe and the United States to voluntarily coordinate oil and gas well spacing on the Jicarilla Indian Reservation. Only the New Mexico oil and gas severance tax (which primarily finances selected capital projects off the Reservation) and the oil and gas emergency school tax (which despite its name is limited to supplying the general fund of New Mexico) are not "justified", and hence are unlawful under the Court's preemption and Commerce Clause precedent.

Court's Indian preemption teachings. New Mexico's confusion stems from its erroneous belief that state mineral taxes can only be preempted upon a showing that the state taxes at issue "substantially" undermine a Tribe's ability to regulate the development of its resources.[7] But this Court in a series of cases has made it clear that state taxes imposed on an important aspect of Reservation commerce comprehensively regulated by federal law may be set aside (a) if the purpose of the state tax is to generate statewide revenues, not to provide specific services assisting Indian commerce and (b) if the state taxes necessarily operate to deter economic development on the Reservation. That is, once a lack of state responsibility has been demonstrated, it is not necessary to demonstrate in addition that the state taxes also fundamentally impair a Tribe's ability to regulate its resources. To the contrary, state taxes may be preempted in the absence of a legitimate state interest, if they interfere with Congress' "overriding goal" of encouraging Reservation economic development, *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083, 1092 n.19 (1987), because the taxes impede the Tribes' efforts to offer private investors economic "comparability" vis-a-vis the Reservation's non-Indian communities. *Id.*

[7] New Mexico cites *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1114 (9th Cir. 1981) (cited in *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 108 S. Ct. 685 (1988)) for its standard. As New Mexico points out, *Crow Tribe* involved a 32% of value severance tax which had the effect of virtually driving all new coal production out of Montana, not just out of the Crow Indian Reservation (New Mexico Brief, p. 15 n.16). What New Mexico omits is the critical fact that the Mineral Leasing Act of 1938, 25 U.S.C. § 396a *et seq.* (under which both Crow coal and Jicarilla oil and gas are leased) was found to preempt state taxes imposed on Crow coal mined *off* the Reservation on lands subject to general state (not federal and tribal) government authority. We do not read New Mexico to claim that such self-destructive state tax policies are a condition precedent to finding preemption on the Indian Reservations. Moreover, we do not know where New Mexico would draw the line in determining at what level its oil and gas taxes would be preempted under the ruling in *Crow Tribe*, given the fact that Cotton's oil and gas production, unlike the Crow production, takes place *on* the Reservation where federal and tribal authority is primary.

In effect, by adopting a narrow test of preemption—namely a showing that state taxes severely "impede" or "reduce" the extraction of Reservation resources—here oil and gas production—New Mexico would have the Court force a cruel choice on the Tribes and their business partners. If a given Tribe elects to tax a Reservation activity, then the Tribe is not injured under New Mexico's theory, for the tribal tax is evidence of the continuing economic viability of the Tribe's mineral resources and the state may continue to tax. Of course, in such a case, Reservation economies are unfairly burdened with taxes,[8] the Tribe's wealth is "necessarily" reduced,[9] and federal Reservation economic growth policies are undermined, even though new mineral production does not come grinding to a complete stop, as in the case of *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 108 S. Ct. 685 (1988).

[8] This Court has found that off the Reservation, multiple taxation of interstate commerce *inevitably* favors local commerce which is subject to a lower tax burden. Compare the finding of "economic disadvantage" upon interstate commerce in *New Energy Co. v. Limbach*, 56 U.S.L.W. 4475, 4476 (U.S. May 31, 1988) with the undisputed fact that Cotton pays a 75% greater oil and gas tax burden when operating on the Jicarilla Reservation than does its competitiors operating across the Reservation line.

[9] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980).

In the alternative, if the Jicarilla Tribe elects not to tax in order to protect the Reservation from multiple taxation then New Mexico, whose priorities the Court has found typically are based on "considerations not necessarily relevant to, and possibly hostile to, the needs of the reservation"[10], will continue to exact an unfair influence over the direction of Reservation economies. As a result, Congress' goal of strengthening tribal self-government and creating a permanent Reservation economy will be defeated. *See Cabazon*, 107 S. Ct. at 1086.

Because New Mexico cannot ignore that Cotton's Reservation activities are inextricably tied to a Reservation-based resource comprehensively regulated by federal law, and because the record below forecloses New Mexico from showing the Court that its Reservation responsibilities fully "justify" the continuing imposition of all five of its statewide oil and gas extraction taxes, the state mounts an attack on Cotton's reliance on the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a *et seq.* and its supporting regulations.[11]

But the State's attack is a peculiar one. A review of the 1938 Act and its regulations reveals that they entrust responsibility in the federal and tribal governments for *all* aspects (financial, environmental, conservation, marketing, safety and transportation) of Reservation oil and gas operations.[12] The Court in *Montana v. Blackfeet Tribe of*

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[10] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983).

[11] *See* New Mexico Brief, pp. 19-24. New Mexico is joined in this effort by a number of its sister states. *See* Brief Amici Curiae of the State of Utah, *et al.*

[12] The one exception appears to be well spacing. While 43 C.F.R. § 3162.3-1 regulates Jicarilla Indian Reservation well spac-

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Indians, 471 U.S. 759, 767 (1985) ruled that the 1938 Act encouraged the Tribes to expand Reservation mineral development in order to fulfill the mandate of the Indian Reorganization Act of 1934 ("I.R.A."), 25 U.S.C. §§ 476 *et seq.* that the Indians build self-sustaining Reservation economies.[13] So New Mexico does not and cannot seriously contend that the federal leasing laws and policies are incomplete or that they invite the state to come on the Reservation and take direct responsibility for producing oil and gas reserves held in trust by the United States.

Rather, New Mexico claims that even though the 1938 Act places full responsibility for oil and gas development in the Tribes and the United States, it contains no express prohibition on state taxation and was enacted during an era when the Court was reducing the scope of the implicit

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ing, the United States, the Tribe, and New Mexico coordinate well spacing on a volunteer basis. Otherwise it is absolutely clear that federal law and federal and tribal governmental programs relieve New Mexico of any responsibility to Jicarilla oil and gas development. Indeed, the Court has noted that the 1938 Act on its face states that "all" oil and gas operations shall be regulated by the Secretary of the Interior, and that in fact "comprehensive" regulations have been developed to control Reservation oil and gas operations. *Kerr-McGee Corp v. Navajo Tribe of Indians*, 471 U.S. 195, 199 (1985).

[13] Congress in 1934 fundamentally changed the Reservation landscape when it enacted the Indian Reorganization Act, which for the first time had the Tribes assume control over their "business and economic affairs" for the purpose of putting the Indian Reservations on a "footing of equal competition" with the non-Indian world. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151, 153 (1973) (quoting 78 Cong. Rec. 11125). As the Court has twice noted, the 1938 Act carried forward that I.R.A. plan to allow the tribes to maximize their revenues from mineral resources, frequently the most important component of the Reservation economy. *See, e.g., Montana v. Blackfeet Tribe*, 471 U.S. at 767 n.5 and *Kerr-McGee*, 471 U.S. at 200.

immunity of the federal government from state taxation. Hence, according to New Mexico, the 1938 Act should be read to authorize unlimited state taxation. In effect, New Mexico requests the Court to sidestep Congress' fifty year federal Reservation development policy and find that Congress in 1938 *silently* authorized open-ended state taxation of Jicarilla oil and gas production. We believe New Mexico's effort to upset settled law[14] and introduce a wholly separate legal doctrine should be rejected.[15] Very

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[14] Of course, New Mexico's approach requires the Court as a practical matter to throw out twenty three years of precedent which created the modern Indian preemption doctrine. *See, e.g., Crow Tribe of Indians v. Montana,* 819 F.2d 895 (9th Cir. 1987), *aff'd,* 108 S. Ct. 685 (1988); *California v. Cabazon Band of Mission Indians,* 107 S. Ct. 1083 (1987); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983); *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980); and *Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685 (1965).

[15] New Mexico argues that because the judicial demise of the intergovernmental tax immunity occurred at a time when Congress was putting in place a comprehensive Indian leasing program, the two events should be treated as the evolution of a single national policy favoring the states at the expense of both the federal government and the Tribes (New Mexico Brief, pp. 19-23). As we next show, that theory ignores the fact that Congress in the 1930's had already embarked on a new policy to save the Reservations and protect them from unjustified state encroachment. As of 1938, the Court had expressly held that congressional authorization was required to permit state *production* taxation of Indian oil and gas operations. *British-American Oil Producing Co. v. Board of Equalization,* 299 U.S. 159, 161 (1936). Further, as of 1938, intergovernmental immunities no longer were available to implicitly bar governmental instrumentalities from *income* taxation. *Helvering v. Mountain Producers Corp.,* 303 U.S. 376 (1938) (holding that federal income taxes could be imposed on a lessee of Wyoming school lands). Therefore, when in 1938 Congress implemented the I.R.A. economic enhancement and tribal self-government policies as they related to mineral development, *see Montana v. Blackfeet*

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simply, Cotton's claims do not rest on the implicit immunity of the federal government. We agree that federal government immunity does not carry the day. However, in setting aside that implicit exemption, the Court expressly acknowledged that protection from state taxation could be

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Tribe, 471 U.S. at 767 n.5, Congress omitted any reference to state tax authority knowing full well that expressed authorizations were still required to allow state *production* taxation of Indian oil and gas. Indeed, it was not until 1949 in *Oklahoma Tax Commission v. Texas Co.,* 336 U.S. 342 (1949) that the intergovernmental immunity vis a vis oil and gas production taxes was eliminated. Importantly, that intergovernmental immunity was eliminated with respect to Indian allotments in Oklahoma, not I.R.A. tribal lands, and it was eliminated with respect to Indians who had earlier been found by the Court to "have no effective tribal autonomy". *Oklahoma Tax Commission v. United States,* 319 U.S. 598, 603 (1943). *See also McClanahan v. Arizona Tax Commission,* 411 U.S. 164, 171 (1973). Hence, there is no need to revisit the Court's 1938 Act ruling in *Montant v. Blackfeet Tribe.* In that 1985 case, the Court properly recognized that Congress intended two different paths to be followed when it came to the taxation of Indian oil and gas production. State taxation would be permitted for the diminishing amount of production still occurring under pre-1938 Act leases, for those leases rested on congressional legislation expressly authorizing state production taxation, enacted during the allotment era when Congress contemplated that all Indian lands would ultimately fall under state jurisdiction. But, for the great majority of oil and gas currently produced on the Reservations under the 1938 Act (which implemented I.R.A. Reservation enhancement policies) the Court declined to find that Congress intended to silently incorporate prior tax authorizations. *Montana v. Blackfeet Tribe,* 471 U.S. at 767 n.6. Finally, any attempt to bifurcate the 1938 Act tax authority between Indian and non-Indian production interests as is suggested by New Mexico is wrong. That is, the express authority to tax Indian production existing prior to the 1934 enactment of the I.R.A. included *both* authority to tax the Indian and the non-Indian share of production. Congress' decision not to authorize state taxation in the 1938 Act operated to protect *both* shares of production from unlimited future taxation. Given that decision, the modern Indian preemption doctrine will permit state taxation of non-Indian production only where documented state interests justify the taxes.

secured through congressional action,[16] and in the special area of protecting the Reservations from intrusive state taxation, Congress has acted to protect the Tribes and their business partners. In enacting the Indian Reorganization Act of 1934 and then four years later the Indian Mineral Leasing Act of 1938, Congress created a partnership between the federal government, tribal governments, and businesses for the express purpose of developing then virtually non-existant Reservation economies. *See Montana v. Blackfeet Tribe*, 471 U.S. at 767; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-53 (1973). As the Court later held, an important tool in that effort was the confirmation of tribal taxing power to raise revenues required for essential governmental services on the Reservations. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982).

The "overriding goal" of Congress to promote tribal self-sufficiency and Reservation economic development free of unjustified state regulation and taxation[17] originated, as noted above, in Congress' plan in the Indian Reorganization Act to put the Reservations on a footing of "equal competition" with the states. That policy, which is necessarily threatened by unjustified state taxation, continues to this day to be aggressively carried forward.[18]

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[16] *See, e.g., Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 364 (1949).

[17] *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083, 1092 (1987).

[18] For example, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 1450 *et seq.* mandates that the Tribes should enjoy an economy "comparable" to that enjoyed by non-Indian neighboring communities. *See* 25 U.S.C.

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New Mexico's suggestion that the Court depart from this 54 year policy and allow general statewide taxes on Reservation mineral development should be rejected. Surely, New Mexico's radical approach would seriously undermine the Tribes' efforts to attract private capital to the Reservations. Moreover, permitting *unlimited* state taxation would inevitably retard Reservation mineral development which on many isolated Reservations, including the Jicarilla Indian Reservation, is by far the Indians' most important economic hope.

Accordingly, we urge the Court to rely on its ample precedent protecting Reservation economic development from unjustified state taxation as set forth in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and confirmed as to mineral production in *Crow Tribe*, 819 F.2d at 895. We believe the Court's 23 years of teachings

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§ 1451. Further, in the Indian Tribe Tax Status Act, 26 U.S.C. § 7871, Congress recognized that Indian tribal governments should be treated as states for numerous purposes, relating to excise taxes, gift taxes, income taxes, and tax exempt bonds under the Internal Revenue Code. *See* S. Rep. No. 646, 97th Cong., 2d Sess. 11 (1982) (recognizing that Indian tribal governments exercise sovereign powers, seek to promote tribal economies and provide governmental services to their people, and so should necessarily occupy a status under the Internal Revenue Code which is similar to the status of states). Then in the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101, *et seq.*, Congress sought to allow the Tribes to realize a greater return on their mineral resources by permitting Tribes to enter into various innovative, flexible agreements for the development of mineral resources. *See* H. R. Rep. No. 746, 97th Cong., 2d Sess. 3 (1982). Finally, in recent legislation to shore up federal protection of Indian mineral resources, Congress directed that "the Secretary [of the Interior] should aggressively carry out his trust responsibility in the administration of Indian oil and gas." *See* 30 U.S.C. § 1701(a)(4).

in the Indian preemption area represent sound public policy, as well as basic fairness.[19]

II. THE COURT'S INDIAN PREEMPTION PRECEDENT IS FULLY CONSISTENT WITH GENERAL PREEMPTION PRINCIPLES.

New Mexico's invitation to have the Court drastically revise its preemption test as applied to Indian affairs relies in part upon a misunderstanding of general principles of federal preemption. According to New Mexico, the Court's recent Indian preemption cases have moved away from determining congressional intent, and the Court should "restor[e] fundamental preemption standards" by refocusing on congressional intent. (New Mexico Brief, p. 7).

This Court has already correctly recognized that the Indian preemption standard is not like that which has emerged in other areas of law: "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Although the Indian preemption standard is admittedly different from general preemption law, it is not inconsistent with that law and it is certainly not insensitive to congressional intent.

General preemption law recognizes that, when the field in question is one traditionally regulated by the states, state authority is not preempted unless there is a clear expression of congressional intent. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (recognizing that the states traditionally regulated grain storage in warehouses); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143-46 (1963) (noting that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern").

[19] With respect to back taxes, Cotton seeks only a return of monies where it filed a protest for refund under applicable New Mexico law. Accordingly, New Mexico's concern with considering potential retroactivity issues need not be reached. (New Mexico Brief, p. 49).

Conversely, when the field in question is one traditionally dominated by the federal government, congressional intent to preempt the field is more readily inferred. The Court has repeatedly recognized that "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice v. Santa Fe Elevator Corp.*, 311 U.S. 218, 230 (1947); *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) (recognizing the need for uniform federal action pertaining to design, size, and movement of vessels); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) (recognizing that Congress intended to occupy the field of sedition).

The field of Indian affairs is one of a very limited number of subject areas where the "federal interest is so dominant" that congressional intent to preempt the field can be *assumed*. In the fields of foreign affairs, admiralty and navigation, and Indian affairs, such federal dominance has been recognized. *See Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) ("supremacy of the national power in the general field of foreign affairs . . . is made clear" and thus "requires that federal power in the field affecting foreign relations be left entirely free from local interference"); *Offshore Logistics, Inc. v. Tallentire*, 106 S. Ct. 2485, 2494-97 (1986) (recognizing the "importance of uniformity of admiralty law" and quoting from congressional debates: "the power to pass laws on this subject [admiralty] is conferred on Congress in the Constitu-

tion, and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148-49 (1980) ("There is no room for these [state fuel] taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies."); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 106 S. Ct. 2305 (1986) ("[W]e have found that where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled preempted by federal law.")

To conclude, the Court's Indian preemption precedent has not been insensitive to congressional intent. Rather, the Court has recognized that Indian affairs is a subject area where the federal interest is so dominant that congressional intent to preempt the field is assumed from the enactment by Congress of federal laws which authorize the United States and the Tribes, not the states, to assume the responsibility for making the Reservations self-sufficient.

III. COTTON IS ENTITLED TO RELIEF UNDER THE COMMERCE CLAUSE.

New Mexico first denies that any "multiple taxation" occurs on the Jicarilla Indian Reservation (New Mexico Brief, p. 37). Yet New Mexico acknowledges that Jicarilla Reservation lessees such as Cotton pay five New Mexico taxes and now three tribal taxes. But New Mexico claims that these eight taxes are imposed by "concentric sovereigns" and hence are not subject to Commerce Clause scrutiny. However, New Mexico's analysis misses the mark. From the point of view of consumers in states other than New Mexico who purchase and consume natural gas

from the interstate gas pipeline fed by Cotton's Jicarilla Reservation wells, the identity of the competing and overlapping taxing entities does not matter. Given the purpose of the Commerce Clause—to preserve a national common market and to prohibit local economic protectionism[20]—there is no conceptual difference between New Mexico/Jicarilla tribal taxation of Cotton's Reservation oil and gas severance and, for example, New Mexico/Arizona taxation of oil and gas severance taking place in New Mexico and being shipped to Phoenix for sale. In both cases, interstate commerce may be "unfairly burdened" if one of the taxing entities is "exacting more than a just share from the interstate activity". *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748 (1978).[21]

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[20] *See New Energy Co. v. Limbach*, 56 U.S.L.W. 4475, 4476 (U.S. May 31, 1988).

[21] New Mexico seeks to defeat Cotton's multiple burden claim by arguing that no precedent supports Cotton and further by arguing that both *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), foreclose the multiple burden claim. Of course there exists no precedent. This issue is one of first impression. Moreover, while *Colville* acknowledged that both tribal and state taxes may be imposed on Reservation cigarette sales, the case is of no help to New Mexico, because in *Colville*, the Court found no federally protected Indian commerce subject to multiple taxation. To the contrary, *Colville* involved an attempt to obtain a competitive advantage on the Reservation through the marketing of an alleged Reservation exemption from state taxes imposed on the sale of cigarettes. Similarly while *Merrion* upheld tribal taxation and acknowledged overlapping state taxation, it is the very case where the Court suggested that Cotton and other Jicarilla lessees may indeed not have to pay an ever increasing penalty for electing to do business on the Reservation, and that a claim of impermissible multiple taxation might be asserted against New Mexico, if New Mexico's responsibilities for Reservation mineral development were out of proportion to its unabated imposition of five general statewide oil and gas taxes. 455 U.S. at 158 n.26.

Finally, New Mexico misses the point when it complains that Cotton's request to be relieved of an "unjustified" multiple burden would require a fundamental restructuring of the nation's Indian Tribes and the nation's states. (New Mexico Brief, p. 41). Cotton has simply responded to the question raised by the Court—Does the Commerce Clause require that an Indian Tribe be treated as a state for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for tribal taxes imposed on those same activities by the Indian Tribe—by submitting that the Tribes should be treated as states for the *limited* purpose of assessing the impact on interstate commerce of taxation by both a state and a Tribe of the local event of oil and gas severance. Given a fifty year congressional plan to promote tribal self-government and Reservation economic self-sufficiency, and given the Court's simultaneous protection of a national common market vis-a-vis local commerce, Reservation taxpayers engaged in interstate commercial activity and their consumers should be afforded the same protection from multiple taxation as is enjoyed by off-Reservation interstate commerce.

Thus, Cotton and other Reservation lessees should be protected from state taxation which is "out of all appropriate proportion to the business transacted" off the Reservation in New Mexico. *See Hans Rees' Sons v. North Carolina*, 283 U.S. 123, 135-36 (1931).[22] Otherwise the

[22] Achieving a reduced and "justified" level of New Mexico taxation can be achieved, of course, either under the preemption analysis or under the Commerce Clause. As noted in the preemption discussion above, documentation of contributions to the Reservation's only public school and to well spacing led Cotton not to seek a refund with respect to those three taxes.

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Court's Commerce Clause teachings emphasizing the need to protect a national common market from "economic disadvantage", *New Energy Co. v. Limbach*, 56 U.S.L.W. 4475, 4476 (U.S. May 31, 1988), as well as from unjustified "higher" tax burdens, *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 170-71 (1983) will be swept aside. Similarly, unless Cotton is provided some relief from its 75% penalty for electing to produce oil and gas on the Jicarilla Reservation, the preservation of a national common market through the elimination of multiple tax burdens will simply bypass the small but growing Reservation component of interstate commerce.[23]

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Under the Commerce Clause, Cotton suggests that because the oil and gas produced under its leases is derived solely from Reservation lands held in trust by the United States, no apportionment is required and New Mexico should be prohibited from imposing its oil and gas taxes. (Cotton Brief, p. 45.) Of course, if Cotton's Reservation leases involved both fee and trust oil and gas reserves, a sound basis for apportionment could be founded on the presence of the trust versus fee title of the oil and gas production, in recognition of the Court's different treatment of Reservation fee and trust lands. *See, e.g., Montana v. United States*, 450 U.S. 544, 557-59 (1981).

[23] In resisting Cotton's efforts to reduce multiple taxation, New Mexico repeatedly relies on the Court's refusal in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 628 (1981) to impose on the "fairly related" fourth prong of the Commerce Clause inquiry an evaluation of state benefits and costs afforded an interstate taxpayer. But as the Court expressly held, the fairly related inquiry (specifically that the tax must be measured in relation to the interstate activities taking place in the state) is dependent upon the establishment in the first instance that a substantial tax nexus exists. *Id.* at 627. A substantial nexus was found in *Commonwealth*, because "[T]he entire value of the coal, before transportation, originates in the State, and mining of the coal depletes the . . . wealth of the State . . ." *Id.* at 625. Indeed, *Commonwealth* expressly held that "no other state can tax the severance". *Id.* at 618. But here, of course, the nexus

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CONCLUSION

New Mexico's taxes are unlawful under both the controlling acts of Congress and the Commerce Clause. Under either claim, the decision of the lower court must be reversed.

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Respectfully submitted,

DANIEL H. ISRAEL, ESQ.
DANIEL H. ISRAEL, P.C.
1100 Stout Street
Suite 850
Denver, CO 80204
Tel. [303] 629-1100

G. SAMUEL SCHAUNAMAN, II, ESQ.
OXY USA INC.
P.O. Box 300
Tulsa, OK 74102
Tel. [918] 561-4278

JANE E. LEIN, ESQ.
COGSWELL AND WEHRLE, P.C.
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Tel. [303] 861-2150
Counsel for Appellants

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to support severance taxes imposed on Reservation production lies with the Jicarilla Tribe, not New Mexico. *See Merrion*, 455 U.S. at 158 n.26. Hence, New Mexico cannot simplistically defend its taxes on the basis of the fairly related fourth prong as analyzed in *Commonwealth*. Moreover, if reduction of the existing multiple tax burden now occurring on the Reservations did not require an elimination of *all* state production taxes, apportionment could be established, as noted above, on the basis of fee and trust land production, on the basis of the state's limited services to the Reservation (*see* Cotton Brief, p.48), or finally on the basis of New Mexico imposing a non-severance tax on Cotton for the privilege of using off-Reservation state services and infrastructure.

SUPPLEMENTAL BRIEF

Supreme Court, U.S.
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No. 87-1327

In The

Supreme Court of the United States

October Term, 1987

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*,
Appellees.

On Appeal From The
Court of Appeals of New Mexico

SUPPLEMENTAL BRIEF OF APPELLANTS COTTON PETROLEUM CORPORATION, ET AL.

Daniel H. Israel, Esq.*
Daniel H. Israel, P.C.
1100 Stout Street
Suite 850
Denver, CO 80204
Tel. [303] 629-1100

G. Samuel Schaunaman, II. Esq.
Oxy Usa Inc.
P.O. Box 300
Tulsa, OK 74102
Tel. [918] 561-4278

Jane E. Lein, Esq.
Cogswell and Wehrle, P.C.
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Tel. [303] 861-2150

Counsel for Appellants

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333
or call collect (402) 342-2831

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SUPPLEMENTAL BRIEF OF APPELLANTS COTTON PETROLEUM CORPORATION, ET AL.

In *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987), the Court protected Reservation bingo games from State of California laws, finding that California could not demonstrate a state interest relating to Reservation bingo (characterized by the Court as the Cabazon Reservation's most important economic activity) which would justify the imposition of state bingo laws. *See* Cotton Reply Brief, p. 7. In the Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467, Congress on October 17, 1988 implemented a comprehensive system for regulating gaming on Indian lands in order to promote Indian Reservation economic development.

In that Act, Congress carefully protected Reservation gaming activity from extraterritorial state taxation. Section 11(d)(4) notes that regulation of Indian gaming is not intended to confer state taxing jurisdiction over the Indian Tribe or its authorized operator. In addition, the Act indicates that a state may not use the necessity for a Tribal/State compact for Class III gaming as a basis for negotiating state taxing authority. *Id.* However, a state is authorized to negotiate for the inclusion of state tax authority over gaming activities, but only when necessary to defray the cost of regulating such activities. Section 11(d)(3)(C)(iii).

Congress' decision to sharply limit the reach of extraterritorial state laws even where complex Class III gaming enterprises such as parimutual horse and dog racing and casino gaming are involved, is fully consistent

with its 50 years of legislation implementing the tribal self-government and Reservation economic revitalization policies of the Indian Reorganization Act of 1938, 25 U.S.C. § 476 *et al.* as well as the Court's Indian preemption precedent. Indeed, in the Gaming Act, Congress "sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years." S. Rep. No. 100-446, 100th Cong., 2d Sess. 5.[1]

Respectfully submitted,

DANIEL H. ISRAEL, ESQ.
1100 Stout Street
Suite 850
Denver, CO 80204
Tel. [303] 629-1100

G. SAMUEL SCHAUNAMAN, II, ESQ.
OXY USA INC.
P.O. Box 300
Tulsa, OK 74102
Tel. [918] 561-4278

JANE E. LEIN, ESQ.
COGSWELL AND WEHRLE, P.C.
1700 Lincoln Street
Suite 3500
Denver, CO 80203
Tel. [303] 861-2150

Counsel for Appellants

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[1]In a different setting—namely federally owned outer continental shelf natural gas—the Court, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982), confirmed earlier this month that extraterritorial state severance and production taxation is not permitted. *Shell Oil Co. v. Iowa Dept. of Revenue*, 57 U.S.L.W. 4001, 4004 (Decided November 8, 1988).

AMICUS CURIAE

BRIEF

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Appellees.

Appeal from the New Mexico Court of Appeals

BRIEF OF AMICUS CURIAE SOUTHERN UTE INDIAN TRIBE IN SUPPORT OF APPELLANTS

FRANK E. (SAM) MAYNES
MAYNES, BRADFORD & SHIPPS
Counsel for the Southern Ute Indian Tribe
of the Southern Ute Indian Reservation
P. O. Box 2717
Durango, Colorado 81302
(303) 247-1755

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BRIEF OF AMICUS CURIAE
SOUTHERN UTE INDIAN TRIBE
IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS

This Brief is submitted with the written consent of the parties to this case, lodged with the Clerk.

Amicus Southern Ute Indian Tribe occupies a reservation consisting of approximately 650,000 acres located in southwestern Colorado. The New Mexico-Colorado state

border serves as the southern boundary of the Southern Ute Indian Reservation and as the northern boundary of the Jicarilla Apache Reservation. The San Juan gas field, one of the Nation's largest oil and gas producing regions, underlies substantial portions of both the Southern Ute Indian Reservation and the Jicarilla Apache Reservation. The Southern Ute Indian Tribe possesses an interest in approximately 850 gas wells. The great majority of those interests constitute royalty interests obtained in oil and gas leases issued to non-Indian oil and gas companies pursuant to the Indian Mineral Leasing Act of 1938. The Tribe has also acquired working interests through mineral development agreements negotiated pursuant to the Indian Mineral Development Act of 1982. All of the Southern Ute Indian Tribe's leases and mineral development agreements have been approved by the Secretary of Interior's authorized delegate.

The revenues derived from the Tribe's mineral development activities represent the Tribe's primary general revenue base. Since 1984, these revenues have amounted to an average annual sum slightly less than Five Million Dollars ($5,000,000) and have constituted approximately ninety percent (90%) of the Tribe's total annual general revenue. This income is the economic lifeblood of the Tribe.

Beginning in 1980, the Tribal Council concentrated its attention and financial resources in developing a thorough in-house energy resource management program. The energy resource program in place today at the Southern Ute Indian Reservation includes an extremely sophisticated accumulation of land-record data, well-by-well production histories, fully cross-sectioned electronic drilling logs, geological structure mapping, and reserve computations. Through integration of information collected during the

last eight years, the Tribe has developed the capability of assisting oil and gas companies in analyzing such matters as the comparative efficiency of varying well completion techniques. Most recently, the Southern Ute Indian Tribe, in conjunction with the United States Geological Survey and the Rocky Mountain Association of Geologists, hosted and participated in a scientific symposium on the development potential of coalbed methane gas. The conference was attended by over 350 representatives of the scientific community and petroleum industry, including individuals from the Australian government, the Netherlands, and Canada.

In 1982, the Southern Ute Indian Tribe adopted a severance tax ordinance that requires oil and gas operators to pay five percent (5%) of the value of products produced from tribal mineral holdings. Proceeds from the Tribe's severance tax

revenue amount to approximately one-third of the general revenue derived from royalty income, or about $1.8 million per year. Additionally, the Southern Ute Indian Tribe, with the encouragement of the Bureau of Indian Affairs, has developed regulatory measures designed to foster prudent gas development in a manner consistent with preservation of archaeological, environmental, and cultural resources of the Tribe.

Like the state of New Mexico, the state of Colorado and its political subdivisions collect production related taxes from oil and gas operators engaged in the development of tribal resources within the boundaries of the Southern Ute Indian Reservation. Those taxes include a county general ad valorem tax based upon the value of annual production from each well located within that county; a county general ad valorem tax based upon the value of oil and gas equipment used in exploration and production related

activities within that county; a state severance tax based upon the annual value of oil and gas severed from any well located within the state; and a conservation levy based upon the wellhead value of oil or gas produced and transported from any field in the state.[1] A conservative estimate of the annual value of these revenues to the state and county exceeds Two Million Dollars ($2,000,000).[2] The state and county taxes

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[1]The state statutory valuation provisions for county ad valorem assessment on well production and equipment are set forth in §39-7-101, et seq., C.R.S. The state severance tax is set forth in §39-29-105, C.R.S., and the state conservation levy is required by §34-60-122, C.R.S. (Suppl.).

[2]The 1987 estimated tax assessment for tribal related mineral development is as follows:

(a) County ad valorem tax on production - $1,327,328.00;
(b) County ad valorem tax on production equipment - $99,016.00;
(c) State severance tax - $591,050.00;
(d) State conservation levy - $35,049.00.
Total - $2,052,443.00.

related to Southern Ute tribal mineral development are greater than the taxes imposed by the Tribe.

The taxes that Colorado and New Mexico impose are directly related to the development of tribal minerals located within reservation boundaries. Any benefits that the Tribes or tribal operators may derive from the general improved financial condition of the states is indirect and attenuated. The tax revenues collected by the state of New Mexico and the state of Colorado are simply used as general revenue that seldom sees its way to the reservations in any form. The existence of the taxes places very real market limitations upon the ability of tribes to increase revenues from their minerals either through higher negotiated royalty rates or through increased tribal taxes. Accordingly, the Southern Ute Indian Tribe supports the position of Cotton Petroleum.

SUMMARY OF ARGUMENT

The Southern Ute Indian Tribe asserts that New Mexico's taxes, and similar taxes imposed by the state of Colorado, are invalid under well-recognized doctrines of tribal infringement and federal preemption. Even if the state of New Mexico's taxes were able to withstand a thorough preemption analysis, the absence of any apportionment of the State's taxes under the Commerce Clause undermines the marketability of tribally produced minerals in frustration of tribal economic development efforts. Through either a strengthening of the preemption analysis or through apportionment under the Commerce Clause, only those state taxes that tax activities not subject to comprehensive federal regulation and that compensate the state for related on-reservation services should be permitted.

ARGUMENT

POINT ONE

THE NEW MEXICO TAXES ON SEVERANCE OF TRIBAL MINERALS LOCATED WITHIN THE BOUNDARIES OF THE JICARILLA APACHE RESERVATION ARE INVALID UNDER THEORIES OF FEDERAL PREEMPTION AND TRIBAL INFRINGEMENT.

A. THE COURT HAS HELD THAT STATE TAXES THAT IMPACT THE ON-RESERVATION ACTIVITIES OF A TRIBE ARE INVALID IN THE ABSENCE OF A SPECIFIC AND LEGITIMATE INTEREST OF THE STATE.

The Court has long recognized the unique position of tribes in relationship to the federal government and the state governments. Warren Trading Post Co. v. Arizona Tax Com., 380 U.S. 685 (1965); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). From its earliest cases involving Indian matters to its most recent pronouncements, the decisions of this Court have consistently determined that Congress has plenary power over tribes, individual Indians, and those who deal with them. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Lone Wolf v. Hitchcock,

187 U.S. 553 (1903); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Many of those cases have examined the role that states may play in relation to activity or conduct that occurs within reservation boundaries; and those decisions have invalidated state regulations that have been inconsistent with federal statutes, federal regulations, or the federal policies fostered by those federal laws or rules. California v. Cabazon Band of Mission Indians, 480 U.S. ___, 107 S.Ct. 1083 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832 (1982); Central Machinery Co. v. Arizona State Tax Com., 448 U.S. 160 (1980).

The Court has on several occasions held that the exercise of state power within Indian Country does not conflict with the federal government's superior role in Indian matters. It is not surprising that the state regulatory power has been upheld when the

principal actors have been non-Indians with little contact either with the reservation, the tribe, or with a federally regulated activity. For example, the state's interest in prosecuting the criminal conduct of a non-Indian against another non-Indian within Indian Country has been upheld. United States v. McBratney, 104 U.S. 621 (1881). Similarly, the Court has permitted the collection of cigarette sales taxes from non-Indians purchasing cigarettes imported onto a reservation primarily to evade the state's sales tax. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). Conversely, the regulatory and taxing power of states over non-Indians within reservation boundaries has been invalidated when the non-Indian is directly involved in an activity subject to substantial tribal or federal regulation, or when the effect of the state's efforts frustrates the tribal interest fostered by the federal

government. New Mexico v. Mescalero Apache Tribe, supra; Ramah Navajo School Board v. Bureau of Revenue, supra; White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

In determining the limits of permissible state power over non-Indians conducting activities within Indian Country, the Court has instructed lower courts to conduct a particularized inquiry of the federal interests, the tribal interests, and the state's interests, and to determine whether the state's exercise of power impermissibly interferes with the federal or tribal interests at stake. White Mountain Apache v. Bracker, supra.

B. THE NEW MEXICO COURT OF APPEALS FAILED TO CONDUCT A THOROUGH PREEMPTION ANALYSIS IN CONCLUDING THAT THE STATE'S TAX WAS PERMISSIBLE.

In conducting the inquiry required by White Mountain Apache v Bracker, supra, the New Mexico Court of Appeals failed to

consider the full extent of the federal and tribal interests. The New Mexico Court of Appeals recognized that the federal policy of "'promoting tribal self-sufficiency and economic development' is paramount to a preemption analysis." Cotton Petroleum v. State of New Mexico, 745 P.2d 1170, 1175 (quoting from White Mountain Apache v. Bracker, 448 U.S. at 143) (N.M.App. 1987). The court also recognized that the major purpose of the Mineral Leasing Act of 1938 is to maximize the economic return to tribes from their property. Cotton Petroleum v. State of New Mexico, 745 P.2d at 1175. The court went on to conclude, however, that because new drilling had taken place and because Cotton Petroleum "reaps sufficient profits" to pay its taxes, the State's intrusion onto the reservation had no impact upon either the Tribe's economic development or its sovereignty. Id.

The New Mexico Court's analysis was superficial. Many traditional gas contracts included specific provisions requiring the purchasers of gas to reimburse producers for severance taxes. See, 15 USCS §3320 (permitting allowance in excess of maximum lawful ceiling price for reimbursement of state severance taxes). Where the purchaser has the option of purchasing gas that excludes a substantial tax burden instead of gas that bears a multiple burden, one must presume that the cheaper commodity will have increased marketability. In more recent periods of spot market sales of natural gas, a producer seeking to sell his commodity may not be able to pass the multiple tax burden on to end users, yet the absorption of the tax necessarily reduces the profits that the producer may derive from tribal minerals that bear both tribal and state taxes.

Under the New Mexico Court's analysis, before any state tax impact is cognizable, the reduction in marketability of tribal minerals must reach the point that wells are no longer drilled by tribal operators or the point at which tribal operators become financially unable to pay taxes to both the tribe and the state. Delaying recognition of the interference with federal and tribal policies of economic development until either the tribe or the operator has been forced out of business is a catastrophic application of the preemption analysis. Neither tribes nor operators should have to wait until their tribal mineral activities are destroyed before interference with the growth of tribal economic activities is recognized.

Similarly, the New Mexico Court of Appeals gave short shrift to the claims of interference with tribal sovereignty raised by the Jicarilla Apache Tribe. In recognizing the validity of the Jicarilla Apache

Tribe's severance tax, this Court acknowledged the sovereign right of tribes to impose taxes upon those conducting business on reservation lands. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). Because tribal governments are primarily responsible for maintaining an ordered society on the reservation, the need for those governments to raise revenue to pay for tribal governmental services available to to those present on the reservation was confirmed. Id. As federal policies promoting tribal autonomy progress, and as the federal government's need for fiscal conservatism is reflected in federal budget reductions, tribal governments are expected to assume a greater financial responsibility for advancing the health and education of their members, extending police protection, and managing reservation natural resources. The present and potential tax revenue requirements of tribal governments,

however, compete directly with the tax programs of states that seek to burden companies for their on-reservation activities. To the extent that the existence of state taxes removes tribal governmental flexibility to increase or maintain current levels of tribal taxes, yet insure that tribally derived products are marketable, those taxes directly interfere with tribal sovereignty.

On previous occasions this Court has upheld the validity of state production taxes against lessees of mineral rights in allotted or restricted lands. See, Oklahoma Tax Com. v. Texas Co., 336 U.S. 342 (1949). In so doing, the Court eliminated the federal instrumentality doctrine as a bar to nondiscriminatory application of state taxes against allotted mineral production where the effect of those taxes did not interfere with a clear federal policy. Thus, mere ownership of the land by the United States in behalf of an

Indian allottee was not sufficient to defeat the state tax.

In distinguishing those cases from the case presently before the Court, one must look to the federal and tribal interests now present with respect to development of tribal minerals. First, the federal legislation authorizing the leases in this case is the Mineral Leasing Act of 1938. As this Court held in Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985), the congressional policy embodied in the 1938 Act went beyond the limits of prior leasing legislation in insulating tribal economic development efforts from the intrusion of state taxes. Further, legislation enacted during the last three decades has emphasized not only the federal interest in promoting tribal economic and governmental development, but also the importance of mineral development in achieving those ends. Sec. 1(b)(7) of the "Notice to Lessees Numbered 5 Gas Royalty Act of

1987," P.L. 100-234, 101 Stat. 1719; The Indian Mineral Development Act of 1982, 25 USCS §2101, et seq.; The Indian Finance Act, 25 USCS §1451, et seq.; The Indian Self-Determination and Education Assistance Act, 25 USCS §450, et seq. Recognition by this Court of the vitally important inherent power of tribes to tax non-Indians present on reservations has been critical in the emergence of tribal governments not simply as political arbiters, but also as the entities primarily responsible for developing the economic infrastructure of reservations. See Merrion v. Jicarilla Apache Tribe, supra. In beginning and ending its analysis of preemption with the Indian Mineral Leasing Act of 1938, the New Mexico Court of Appeals failed to consider the effect of state taxes upon tribal sovereignty in the context of the expanding role and financial needs of modern tribal governments.

C. THE COURT SHOULD ESTABLISH A PRESUMPTION THAT SIMPLIFIES APPLICATION OF THE WHITE MOUNTAIN APACHE BALANCING TEST.

In Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. at 845, this Court declined to adopt the suggestion of the Solicitor General to establish presumptions that would simplify the application of the preemption analysis. Rejection of the Solicitor General's suggestion was based upon the Court's belief that the existing preemption test articulated in White Mountain Apache as applied in subsequent cases was adequate to preclude any state tax that "stands as an obstacle to the accomplishment of the full purposes of Congress." Id. at 845 (quoting from Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

Where the on-reservation activity involves the development and management of natural resources held in trust by the Federal Government and subject to

comprehensive federal regulation, the Southern Ute Indian Tribe urges that the Court adopt a presumption similar to that previously suggested by the Solicitor General.

In establishing this presumption, tribes, their lessees, or contractors could be required to demonstrate that the activity taxed by the state relates directly to the development of the trust resource and that the Federal Government supports development of that resource by both enabling legislation and regulation. Having made such a showing, state taxation of that activity should be presumed impermissible until the state has met the burden of establishing congressional consent to the state intrusion or a compelling need to protect legitimate, specified state interests other than a generalized desire to collect revenue.

In the absence of such clarification of the preemption analysis in the context of mineral development, the Southern Ute

Indian Tribe fears that tribes, their lessees, or contractors will be repeatedly required to contest the efforts of states to use tribal natural resource development activities as a cash register to fund non-reservation state programs. The expense, delay, and uncertainty associated with these contests in state court is an extreme burden upon tribes and their contractors.

POINT TWO

IN THOSE INSTANCES IN WHICH A STATE TAXES THE DEVELOPMENT OF TRIBAL RESERVATION RESOURCES ALSO SUBJECT TO TRIBAL TAXATION, APPORTIONMENT OF THE STATE'S TAX UNDER THE COMMERCE CLAUSE IS REQUIRED TO PRESERVE MARKETABILITY OF THE TRIBALLY DERIVED PRODUCT IN FURTHERANCE OF THE FEDERAL GOVERNMENT'S POLICY OF FOSTERING TRIBAL ECONOMIC DEVELOPMENT.

A. THE PREEMPTIVE EFFECT OF FEDERAL POLICIES FOSTERING TRIBAL ECONOMIC DEVELOPMENT AND SELF-DETERMINATION SHOULD BE CONSIDERED IN REVIEWING THE VALIDITY OF STATE TAXES UNDER THE COMMERCE CLAUSE.

Amicus Southern Ute Indian Tribe believes that state taxation of tribally taxed

natural resource development will generally be precluded through application of a thorough preemption analysis. Consideration of the state's interests in imposing such taxes under the preemption analysis should result in the disallowance of state taxes that have little relationship to the delivery of state services on the reservation. Ramah Navajo School Board v. Bureau of Revenue, supra; White Mountain Apache v. Bracker, supra.

As previously noted, the application of a preemption analysis appears appropriate whether the party challenging the state tax is a tribe, a tribal lessee, or a tribal contractor. This conclusion, however, is admittedly subject to question. The New Mexico Court of Appeals addressed this issue in the following manner:

> Under a strict preemption analysis, Cotton's claim would fail. Cotton, not the Tribe, pays the taxes in question.

Cotton Petroleum v. New Mexico, 745 P.2d at 1175.

Indeed, in Ramah Navajo School Board v. Bureau of Revenue, this Court noted that the Navajo School Board through its construction contracts was ultimately the party upon whom the burden of the tax fell. 458 U.S. at 836.

Because of the present uncertainty of the right of tribal lessees and contractors to raise tribal preemption claims, it is possible for trial courts to dismiss the impact of state taxes upon tribal economies and tribal governmental decision-making through mechanical application of "legal incidence" tests. Similarly, in evaluating the preemption claims of tribes, the interference of state taxes upon tribal economic and governmental decision-making can be brushed aside by state courts that choose to recognize only those impacts expressly passed on to tribes through contractual provisions. The

combined impact of multiple tribal and state tax burdens upon the marketability of tribal products may simply fall through the cracks, yet reduced or limited marketability of tribal products caused by multiple tax burdens can effectively nullify the ability of tribes to produce the present and future revenue required to run tribal governments.

Whether the analysis is founded in a Supremacy Clause preemption framework, or in an apportionment review under the Commerce Clause, the Court should develop standards of review sufficient to insure that state tax plans do not interfere with reservation based economic development efforts. Such an apportionment analysis should permit collection of only those state taxes from non-Indians necessary to compensate the state for the delivery of related on-reservation services and should preclude the collection of state taxes that interfere with tribal economic development efforts. The

need for such an apportionment is particularly apparent when a traditional preemption analysis is bypassed on "legal incidence" grounds or upon a finding of the absence of a direct tribal burden.

B. IN APPORTIONING STATE TAXES UNDER THE COMMERCE CLAUSE, TRIBES SHOULD NOT BE TREATED AS STATES.

The Commerce Clause of the United States Constitution grants Congress the power "to regulate Commerce with foreign Nations and among the several States and with Indian Tribes." Art. I, §8, cl. 3. The identification of three categories of commerce in the United States Constitution was founded upon distinct policy considerations. Cherokee Nation v. Georgia, 30 U.S. at 18. The Interstate Commerce Clause was designed to maintain equality between states in a national common market. Hunt v. Washington State Apple Advertising Com., 432 U.S. 333, 350 (1977); H.B. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 539

(1949). The Indian Commerce Clause was designed to remove states from exercising control over commerce with Indian tribes. County of Oneida, New York v. Oneida Indian Nation, 470 U.S. 226, 235-236 (1985). The Commerce Clause power of Congress over Indian tribes is substantially broader in scope than the Commerce Clause power of Congress over states. F. Cohen, Handbook of Federal Indian Law, 93-94 (1942, Univ. of N.M. Press). The historical exercise of congressional authority over tribes and their members has involved the most fundamental aspects of tribal existence, including termination of tribal governments. See, e.g., Menominee Tribe v. United States, 391 U.S. 404, 412 (1968); Tiger v. Western Inv. Co., 221 U.S. 286, 315 (1911). The plenary scope of congressional power over tribes was premised upon the subservient or dependent nature of tribes to the federal government and was justified by the exclusive and

unique trust relationship that the federal government had with tribes. Id. To treat tribes as states in apportioning state taxes is inconsistent with the separate provisions of the Commerce Clause and with the dramatically different way that tribes and states have been treated since the founding of this Nation.

C. APPORTIONMENT OF STATE TAXES DIRECTED TO ON-RESERVATION ACTIVITIES SHOULD REFLECT THE PRE-EMPTIVE EFFECT OF FEDERAL POLICIES AND SHOULD RESTRICT STATE TAXES TO THOSE REQUIRED IN PROVIDING ON-RESERVATION SERVICES.

In Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), this Court permitted the imposition of an unapportioned state severance tax where it found that the nexus between the state and the taxed activity could be attributed to only the taxing state. Application of the Commonwealth v. Montana analysis to federally regulated on-reservation activities is inadequate to protect the federal interests

founded in the Indian Commerce Clause. The Commonwealth analysis ignores the fact that tribes located on reservations within the taxing state may have an independent interest in taxing the same activity. The Commonwealth analysis also fails to consider not only the competing nature of tribal taxation, but more importantly, the preemptive effect of federal policies formulated pursuant to the Indian Commerce Clause and insulated from state interference under the Supremacy Clause.

In order to preserve federal Indian policies from interference caused by state taxing of an on-reservation activity, and in order to eliminate the deleterious effects of multiple tribal and state taxation of the same on-reservation activity, Amicus Southern Ute Indian Tribe urges that state taxes related to on-reservation activities be permitted under the Indian Commerce Clause only in those instances in which the activity taxed

by the state is not subject to comprehensive federal regulation and when the tax is necessary to compensate the state for providing on-reservation services related to the taxed activity.

CONCLUSION

The imposition of state severance taxes upon the on-reservation development of tribal minerals negatively impacts the profitability of tribal resources. This negative impact not only reduces the potential for tribal resource development, but also reduces the source of tax revenue available to tribes. State tax plans that serve to limit federal policies of promoting tribal economic self-sufficiency and self-determination through the development of resources subject to comprehensive federal regulation should be presumed as preempted under White Mountain Apache v. Bracker, supra. Additionally, under the Indian Commerce Clause, only those state taxes that tax on-

reservation activities not subject to comprehensive federal regulation and that compensate the state for providing related on-reservation services should be permitted.

Respectfully submitted,

MAYNES, BRADFORD & SHIPPS

By: Frank E. Maynes

Frank E. Maynes, No. 1763
Attorneys for Amicus Southern
Ute Indian Tribe
P. O. Box 2717
Durango, Colorado 81302
(303) 247-1755

AMICUS CURIAE

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BRUCE DOUGLAS BLACK*
Campbell & Black, P.A.
Post Office Box 2208
Santa Fe, New Mexico
87504-2208
Tel. [505] 988-4421

JOHN K. MANGUM
Nielsen & Senior
Post Office Box 11808
Salt Lake City, Utah 84147
Tel. [801] 532-1900

*Counsel of Record

KEVIN N. ANDERSON
Fabian & Clendenin
215 S. State Street
Salt Lake City, Utah
84111-2309
Tel. [801] 531-8900

ALAN L. SULLIVAN
Van Cott, Bagley, Cornwall
& McCarthy
50 S. Main Street
Post Office Box 45340
Salt Lake City, Utah 84144
Tel. [801] 532-3333

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Texaco Inc., Chevron U.S.A. Inc., Union Oil Company of California, Phillips Petroleum Company, Wilshire Oil Company of Texas, Exxon Corporation, Mobil Exploration and Producing North America Inc., Anadarko Petroleum Corporation, Southland Royalty Company and Marathon Oil Company respectfully submit this brief as *amici curiae,* in support of the position of Appellants in this case.

INTEREST OF AMICI CURIAE

Texaco Inc., Chevron U.S.A. Inc., Mobil Exploration and Producing North America Inc., Phillips Petroleum Company, Union Oil Company of California, Exxon Corporation, Wilshire Oil Company of Texas, Anadarko Petroleum Corporation, Southland Royalty Company and Marathon Oil Company are or have been producers of oil and gas from portions of the Navajo Indian Reservation situated in the southern part of Utah.[1] The oil and gas leases from the Navajo Tribe under which these *amici* operate were approved by the Secretary of the Interior pursuant to the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§396a-396g (1982). The leases provide for the payment of bonuses, rents and royalties to the Tribe, all of which *amici* have paid, for the right to extract oil and gas from Navajo tribal lands.

In 1978, the Navajo Tribal Council legislated a Business Activity Tax, 24 N.T.C. §§ 401-445 and a Possessory Interest Tax, 24 N.T.C. §§ 201-245. In 1985, the Navajo Tribal Council added a Severance Tax, 24 N.T.C. §§ 301-345, which allowed oil and gas producers to pay the Severance Tax in lieu of the Business Activity Tax. The vast majority of Navajo tax revenue is from production of its oil, gas, coal, uranium, and electric power.

The decision of the New Mexico Court of Appeals in this case unmistakably suggests that New Mexico may ignore the restrictions implicit in the Indian Commerce Clause and the federal government's relationship with

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1 Many of the *amici* also produce oil, gas and minerals on other Indian reservations.

Indian tribes, and tax non-Indian lessee interests in oil and gas production on the Jicarilla Reservation. Reservation production which is subjected to both tribal and state taxation will be at a competitive disadvantage. Our interest in this case stems from a desire to continue production on the Navajo Reservation under terms and conditions approved by the Secretary of the Interior, and which are not inconsistent with federal policies favoring tribal self-sufficiency and tribal self-government. If the New Mexico Court of Appeals is affirmed, both the Tribe's tax base and the multi-million dollar investments made by these *amici* will be reduced in value.

The oil, gas and other minerals produced from Indian reservations are frequently sold in interstate markets. In fact, all of the oil and gas produced and sold by these *amici* from the Navajo Reservation flows into interstate commerce. The Navajo Tribal Council has characterized the Navajo Nation as "a principal supplier of crucial energy resources critical to the development of the United States economy."[2] As well it might: between 1978 and 1986 Navajo tribal lands yielded more than 65 million barrels of oil, more than 186 million tons of coal, and more than 70 million cubic feet of natural gas.[3]

Amici have paid over $50,000,000 in Navajo Tribal taxes between 1978 and 1987 on their production of these resources and on property related to such production.

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2 "Navajo Energy Policy", Navajo Tribal Council Resolution, CAP-34-80 (April 29, 1980).

3 Navajo Nation Department of Economic Development, *The Navajo Nation Overall Economic Development Program 1987 Annual Progress Report* 23 (1987).

During the same period, these producers paid more than an additional $75,000,000 Utah state and local taxes. The effective tax rate of the combined taxes is approximately eighteen (18) percent of the value of production, about ten (10) percent of which is state and local taxes.[4]

This cumulative tax burden on their property and production places *amici* at a distinct commercial disadvantage with respect to competitors who produce oil and gas from adjacent non-tribal lands. State taxation also discourages the massive investment necessary to finance sophisticated, enhanced recovery of hard-to-reach oil reserves; in the long run, the combined tribal and state taxes will prevent the development of tribal resources that otherwise would be sold to consumers nationwide.

SUMMARY OF ARGUMENT

In noting probable jurisdiction, this Court invited the parties to brief and argue the following question:

> Does the Commerce Clause require that an Indian tribe be treated as a state for purposes of determining whether a state tax on non-tribal activities conducted on an Indian reservation must be apportioned to account for taxes imposed on those same activities by the Indian tribe?

Amici do not believe Indian tribes should be treated as States of the Union but rather urge the central involvement of the federal government in Indian affairs dictates

[4] *Amici*, with the exception of Marathon Oil Company, are currently in the midst of litigation in the Utah state court on similar issues.

the apportionment formula adopted in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) be applied.[5]

In light of the unique federal relationship and the predominant federal role in commercial relations with the Indian tribes, *amici* submit that, for purposes of the Commerce Clause, Indian tribes are more analogous to "federal municipalities" than states. The necessity that the federal government speak with one voice in regulating commerce "with Indian tribes" and the fact some Indian reservations lie in more than one state dictate that the states not be allowed to impinge upon federal policy in dealing with the Tribes.

The language of Article I, Section 8, Clause 3 of the Constitution, which gives Congress power to regulate commerce "with the Indian tribes," is also more analagous to the language giving Congress powers to regulate commerce "with foreign nations" than the phrase granting it power to regulate commerce "among the several states." *Amici* respectfully submit, therefore, that constitutional principles restricting state taxes imposed upon commerce "with Indian tribes" should be

[5] *Amici* note that the taxes at issue appear to be real property taxes and one taxing jurisdiction may not tax the property of another jurisdiction without violating due process. *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954); *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 80-81 (1938). However, insofar as the Court is considering state taxation of personal property or transient activities on an Indian Reservation, *amici* believe Indian reservations are conceptually different from States of the Union for purposes of analysis under the Commerce Clause.

patterned after the principles governing commerce "with foreign nations" as set forth in *Japan Line, Ltd.*

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS A UNIQUE RELATION TO, AND CENTRAL ROLE IN, INDIAN AFFAIRS

The relationship between the federal government and Indian governments is *sui generis*.[6] Early in the nation's history, Chief Justice Marshall noted, "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). The federal government dealt with tribes through treaties, but Chief Justice Marshall treated them as "domestic dependent nations" for purposes of Constitutional analysis. *Id.* The Court recognized, therefore, that while an Indian nation shared legal characteristics of both a State of the Union and a foreign nation, it was not Constitutionally recognized as either entity. *Id.*

It is clear, however, that the federal government plays a central, and often exclusive, role in regulating

[6] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *United States v. Ramsey*, 271 U.S. 467 (1926).

Indian affairs.[7] As domestic dependent nations Indian reservations have been compared to federal municipalities,[8] a somewhat useful model in determining boundaries for commerce clause purposes. Speaking for the majority in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), Justice Marshall, quoting a portion of a concurring opinion in the Tenth Circuit, pointed out that since the Jicarilla Tribe provided "police protection and other governmental services" it must have taxation authority over the property and resources within the reservation:

> We agree with Judge McKay's observation that "[i]t simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes."

Id. at 138 n. 5.

[7] *United States v. Ramsey*, 271 U.S. 467 (1926); *Leighton v. United States*, 161 U.S. 191 (1896); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[8] *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 241 n. 8 (1985) (quoting *United States v. Joseph*, 94 U.S. 614, 616-17 (1877)); *Talton v. Mayes*, 163 U.S. 376, 383 (1896); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 550 (10th Cir. 1980) (McKay concurring), *aff'd*, 455 U.S. 130 (1982); *Felix S. Cohen's Handbook of Federal Indian Law*, 124 (1942 ed., 1971 reprint); Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1, 4 (1942).

Because of the many treaties and long history of its trust obligations with Indian tribes, the federal government has an even more pervasive role in Indian affairs than it does in governing a federal municipality such as the District of Columbia. Indian reservations occupy a unique position in the federal form of government. They are clearly not States of the Union and while they are not a part of the federal government and do not derive their basic sovereignty therefrom, the federal government has a unique relationship with the tribes. This relationship makes the federal government vitally interested in protecting Indian commerce and the economic development it creates on Indian reservations.

II. BOTH HISTORY AND THE SIGNIFICANT FEDERAL INVOLVEMENT IN INDIAN COMMERCE DICTATE THE TEST ENUNCIATED IN *JAPAN LINE, LTD.* SHOULD BE APPLIED TO INDIAN COMMERCE

The Framers delineated the authority of Congress to regulate commerce in three distinct areas. Article I, Section 8, Clause 3 of the United States Constitution grants to the Congress the power to regulate commerce (1) "with foreign nations," (2) "among the several states," and (3) "with the Indian Tribes."

The Indian Commerce Clause has been recognized as the central source of the extensive federal power over our relations with the Indian tribes.[9] In light of the unique

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[9] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973); I Op. Atty. Gen. 645 (1824).

federal role, numerous legal commentators have pointed out that the power of Congress over commerce with the Indian tribes was intended to be much greater than its power over commerce "among the several states." In *Federal Indian Law*, the United States Department of the Interior recognized that "the congressional power over commerce with the Indian tribes plus the treatymaking power is much broader than the power over commerce between the States."[10]

In support of this conclusion, the Interior Department treatise quoted from Prentice & Egan, *The Commerce Clause of the Federal Constitution*, which described the genesis of the Indian Commerce Clause in the following terms:

> * * * The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting, or discriminating State legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks.
>
> A grant made with such a purpose must convey a different power from one whose purpose was to ensure the freedom of commerce. Congress has, in the case of the Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under Federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce.

Id. at 27 n. 5.

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[10] United States Department of Interior, *Federal Indian Law* 27 (1958)

As former Interior Department Solicitor Nathan R. Margold pointed out in his introduction to Felix Cohen's *Handbook of Federal Indian Law,*

> The doctrine that Indian affairs are subject to the control of the Federal Government, rather than that of the states, derives from two legal sources. In the first place, the Federal Constitution expressly conferred upon the Congress of the United States the power "to regulate commerce with the Indian tribes." Matters internal to the tribe itself even to this day have been left largely in the hands of tribal governments. Federal power has generally been invoked in matters arising out of commerce with the Indian tribes, in the broad sense in which that phrase has been used to include all transactions by which Indians sought to dispose of land or other property in exchange for money, liquor, munitions or other products of the white man's civilization. The growth of the commerce clause has meant the expansion of federal power in Indian affairs, at the expense of state power.

Felix S. Cohen's Handbook of Federal Indian Law, at XXIV (1942 ed., 1971 reprint).

The intent of the authors of the Constitution to grant to the federal government the exclusive power over commercial negotiations with Indian nations has also been recognized repeatedly by this Court. In *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 19 (1831), Chief Justice Marshall stated that the purpose of the Indian Commerce Clause was "to give the *whole power* of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the confederation." (emphasis added). The Court also recognized the states were potential rivals and adversaries of

Indian government, and as such their interference in Indian affairs was carefully circumscribed.[11]

The legislative branch has also recognized its responsibility in assuming control over commerce "with the Indian tribes." As early as 1790 Congress began to enact comprehensive "trade and intercourse acts,"[12] detailing specifically by whom and on what terms trade could be conducted with Indian tribes. Congress has also relied upon its Commerce Clause authority to regulate travel and the furnishing of articles, services and money by the federal government.[13]

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[11] *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832); *see also Roff v. Burney,* 168 U.S. 218 (1897); *United States v. Kagama,* 118 U.S. 375, 384 (1886); *United States v. Forty-Three Gallons of Whiskey,* 93 U.S. 188 (1876); Washburn, *The Historical Context of American Indian Legal Problems,* 40 Law & Contemp. Probs. 12 (1976). This is particularly true in the area of taxation. *See, e.g., Crow Tribe of Indians v. Montana,* 819 F.2d 895 (9th Cir. 1987), *aff'd mem.,* ___ U.S. ___, 108 S.Ct. 685 (1988); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 158 n.26 (1982).

[12] Act of July 22, 1790, ch. 33, 1 Stat. 137. This statutory policy was carried forward without significant modification. Act of March 1, 1793, ch. 19, §§ 6, 7, 1 Stat. 329; May 19, 1796, ch. 30, 1 Stat. 469; Act of March 3, 1799, ch. 46, 1 Stat. 743; Act of March 30, 1802, ch. 13, 2 Stat. 139; Act of May 6, 1822, ch. 58, 3 Stat. 682; it was then codified from the Act of June 30, 1834, ch. 161, §§ 3, 7, 20, 4 Stat. 729-30, 732, repealed in part, now codified at 18 U.S.C. §§1152, 1160, 1165, 25 U.S.C. §§ 177-180, 193-94, 230, 254, 263-64.

[13] *See, e.g.,* Act of May 19, 1796, § 3, 1 Stat. 469-70; Act of April 18, 1796, §§ 5, 6, 1 Stat. 452-53, Act of March 3, 1809, § 1, 2 Stat. 544.

History supports the conclusion that it is the federal government and not the states that governs commerce with the Indian tribes:

> Since the Declaration of Independence and the beginning of our National Government, authority to enact this special legislation pertaining to Indians has been vested specifically or impliedly in the Federal Government, first by the Articles of Confederation, and later by the Constitution of the United States.

United States Department of Interior, *Federal Indian Law* at 1.

Commerce "with the Indian tribes," then, has been recognized as an area in which the federal government must speak with one voice and in which the states are, therefore, generally prohibited from interfering.[14] Because of the fact that Indian tribes are preexisting and separate sovereigns[15] whose relations with the federal government are more like those of foreign nations, Indian Commerce Clause questions have an essential political component.[16] The authors of the Constitution clearly

[14] From the earliest days of the Republic, President Washington recognized the irreparable damage Georgia and North Carolina were causing in Indian relations and the necessity for an exclusively federal policy in regulating trade and social relations with the Indian tribes. 1 Annals of Cong. 66-72 (J. Gales ed. 1789); *see also* The Federalist No. 42 (J. Madison).

[15] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-57 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

[16] *Compare Chippewa Indians of Minnesota v. United States*, 301 U.S. 358, 375-76 (1937), *with Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).

envisioned that it was the Congress, therefore, and not the states, which was to establish and control commerce with Indian Tribes.

Both the Framers' choice of language and the historical context suggest the draftsmen of the Constitution intended Indian commerce to be regulated in much the same fashion as foreign commerce.

The Framers of the Constitution were cognizant not only of the danger in allowing the states to conduct their own relationships with Indian tribes,[17] but also with foreign governments. The Commerce Clause speaks of the power of Congress to regulate commerce "with the Indian tribes" just as it authorizes regulation of commerce "with foreign nations."[18] The specific language of the Commerce Clause was chosen carefully to effectuate specific goals. *Knowlton v. Moore*, 178 U.S. 41 (1900). The use of this identical language confirms that the framers intended the two phrases to be parallel; the language recognizes the establishment of a relationship between the federal government and foreign nations similar to

[17] With regard to foreign commerce, this Court has found that Congress has a power that is "plenary . . . its exercise may not be limited, qualified, or impeded to any extent by state action." *Board of Trustees v. United States*, 289 U.S. 48, 56-57 (1933); *see generally* 1 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 4.2 (1986).

[18] As with the Indian Commerce Clause, this Court has found that as between Congressional power over interstate and foreign commerce, "there is evidence that the Founders intended the scope of the foreign clause to be the greater." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 447 (1979); *see infra* pp. 17-18.

that which existed between the central government and Indian tribes.

The Indian tribes, many existing beyond the western borders of the young nation, were indeed regarded as akin to foreign nations.[19] From the earliest days of the Republic, the federal government negotiated and ratified treaties with Indian tribes in the same fashion as it concluded treaties with foreign states.[20] Many of the treaties explicitly recognize in Congress "the sole and exclusive right of regulating the trade with the Indians . . . ."[21] Chief Justice Marshall recognized the significance of this in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-60 (1832):

> The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words "treaty" and "nation," are words of our own language, selected in

[19] *Washington v. Washington State Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242-3 (1872); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 590-94 (1832) (McLean, J. concurring).

[20] Early in its proceedings the Continental Congress appointed a committee to negotiate with the Indians and on July 12, 1775 resolved, "That the securing and preserving the friendship of Indian nations appears to be a subject of the utmost moment to these colonies". II *Journal Continental Congress* 174 (Library of Congress ed. 1775).

[21] Treaty with the Delaware Indians, September 17, 1778, 7 Stat. 13; *see also* II C. Kappler, *Indian Affairs, Laws and Treaties* 10, 13, 15-16, 42-43, 226, 228, 230, 233, 235, 237, 240, 242, 245, 256, 258-59, 261 (1904).

> our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense.

Based on the failings of the Confederation, the framers of the Constitution expressly sought to strengthen the federal role in dealing with both Indian and foreign commerce. In *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876), for example, the Court traced the origin of the language granting Congress the power to deal with commerce with Indian tribes and compared it to the Congressional power over foreign commerce:

> Under the articles of confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of a State within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; *and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes, – a power as broad and as free from restrictions as that to regulate commerce with foreign nations.*

(Emphasis added).

In 1977 the American Indian Policy Review Commission issued its report to Congress. The Committee, chaired by Senator Abourezk, issued an exhaustive report covering virtually every facet of Indian affairs. In its introductory note the Committee pointed out the international law origin of the relationship between the federal government and the Indian tribes:

> The relationship of the American Indian tribes to the United States is founded on principles of international law. It is a political relation: a relation of a weak people to a strong people; a relation of weak governments to a strong government; a relationship founded on treaties in which the Indian tribes placed themselves under the protection of the United States and the United States assumed the obligation of supplying such protection.

I. *American Indian Policy Review Commission Final Report* 4 (1977).

The Constitution, therefore, recognizes that the Federal government must regulate Indian Commerce as it must regulate foreign commerce, to the exclusion of state regulatory authority. Since Congress must exercise plenary power in this area,[22] the law has recognized that state taxation of commerce "with foreign nations" and "with Indian tribes," is governed by a different principle than that which applies to state taxation of interstate commerce.

In analyzing state taxes on "commerce among the states," the Court has developed a four-prong test. In order to satisfy the requirements of the Interstate Commerce Clause, a state tax on activities related to interstate commerce must be "applied to an activity with a substantial nexus with the taxing State, [be] fairly apportioned, . . . not discriminate against interstate commerce, and [be] fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

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[22] *Brolan v. United States*, 236 U.S. 216, 222 (1915); *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955).

Under the Foreign Commerce Clause, however, this Court has required that state taxation not only satisfy the *Complete Auto Transit* requirements, but clear two additional hurdles designed to preserve federal preeminence.

In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), this Court considered a county tax upon instrumentalities of commerce owned, based, or registered abroad and used exclusively in international commerce. *Id.* at 444. The Court held the county tax invalid, although it satisfied the standards set forth in *Complete Auto Transit*. In such a situation the Court held that a state tax on commerce with foreign nations must meet two tests in addition to those set forth in *Complete Auto Transit*. First, it must not create a substantial risk of multiple taxation. Second, a state tax must not prevent the federal government from "speaking with one voice in regulating foreign trade."[23] *Id.* at 452.

The concerns leading the Court to impose the additional limitations on taxation of foreign commerce in *Japan Line, Ltd.* exist as well in the area of commerce "with Indian tribes." As in the area of international trade, if the states are allowed to impose taxes on Indian commerce, a "substantial risk of multiple taxation exists."

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[23] *Id.* at 452. In a somewhat different context, the Solicitor General has advocated that the dormant Indian Commerce Clause be interpreted to construct a test similar to *Japan Line* for state taxation of Indian commerce. *See* Amicus Curiae Brief by the United States at 18, filed in *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982).

The *Cotton* case, and dozens of others now pending,[24] clearly illustrate that, if the states and their subdivisions can tax without limitation or coordination with tribal taxation, "multiple taxation" is a virtual certainty. Such multiple taxation will compromise federal goals.

Because of the unique historical antecedents of federal Indian relations and the trust responsibility arising therefrom,[25] it is imperative the federal government be able to set the agenda for Indian policy without state infringement. In fact, the New Mexico tax at issue herein is directly contrary[26] to the federal policy of encouraging

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[24] *Amici*, with the exception of Marathon Oil Company, are involved in a challenge to the validity of various Utah state and local taxes imposed on their oil and gas production from the Navajo Reservation. *Texaco v. San Juan County*, Nos. 4152-53, 4146-57, 4973-77 consolidated (San Juan County, Utah). Although *amici* have focused more directly therein on federal preemption and interference with tribal sovereignty, Commerce Clause barriers remain an issue in our Utah litigation and many similar cases. *See, e.g., Peabody Coal Co. v. State of Arizona*, 8 Ariz. Adv. Rep. 19 (Ct. App. 1988); *Kerr McGee Corp. v. Apache County*, No. 6553 (Apache Co. Superior Ct.; *Pittsburg & Midway Coal Mining Co. v. Del Curto*, No. SF 86-11(C) (First Judicial Dist. Ct., New Mexico).

[25] *United States v. Mitchell*, 445 U.S. 535, 544 (1970); *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935).

[26] State taxation has repeatedly been held to be preempted because it interferes with the clearly expressed federal goal of maximizing tribal revenue from tribal resources. *See, e.g., Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir.

(Continued on following page)

the development and economic self-sufficiency for tribal self-government.[27]

Tribal governments must be allowed to "carry out municipal functions approved and mandated by Congress" and to finance such governmental services through taxation of reservation activities. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n. 5 (1982); *see also Kerr McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985). This requires that Tribes be allowed to develop economies "comparable" to off-reservation economies. *California v. Cabazon Band of Mission Indians*, ___ U.S. ___, 107 S.Ct. 1083, 1092-93 (1987). This will not be possible if states are allowed to impose multiple taxes upon Reservation economic activities.

The need to allow the federal government to speak with "one voice" on Indian commerce is further emphasized by the fact that the federal government established several Indian reservations which lie in more than one state. Laurence, *The Indian Commerce Clause*, 23 Ariz. L. Rev. 203, 245-46 (1981). The Navajo Indian Reservation, which is the basis of *amici's* challenge to state taxation, straddles Arizona, New Mexico, and Utah, and "Navajo commerce" immediately enters Colorado as well. If the federal government is not allowed to speak with one

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1987), *aff'd mem.*, ___ U.S. ___, 108 S.Ct. 685 (1988); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

[27] *See* Appellants' Docketing Statement at 14-20.

voice, each of these states may regulate commerce in different portions of the Navajo Reservation with different goals and inconsistent results.

In spite of the fact that the language and early history of the Indian Commerce Clause would support a clear analogy to the Foreign Commerce Clause, very little legal precedent has been developed in this area.[28] It is, therefore, imperative that this Court establish clear guidelines so that the lower courts and practitioners will have a polestar in making important legal and commercial decisions regarding reservation activities and investments.[29] The origin of Indian sovereignty and the

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[28] What precedent has developed is conflicting and often lacks insightful analysis. *Compare Browning v. United States*, 6 F.2d 801 (8th Cir.), *cert. denied*, 269 U.S. 568 (1925), *with State Department of Fisheries v. De Watto Fish Co.*, 100 Wash. 2d 568, 674 P.2d 659, *cert. denied*, 466 U.S. 953 (1983).

[29] Legal commentators have been divided on whether the Indian Commerce Clause, in and of itself, is an effective shield from state power. In Clinton, *State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D.L. Rev. 434, 436-37 (1981), Professor Clinton argues that the negative implications of the Commerce Clause are a ban to state taxation and regulation of Indian commerce. For the opposite view, *see* Pelcyger, *Justices and Indians: Back to Basics*, 62 Or. L. Rev. 29, 41 (1983). In Feldman, *Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law*, 64 Or. L. Rev. 667, 669 (1986), the author argues that, while there should be a presumption of exclusive federal power under the dormant Indian Commerce Clause, a formula which allows some balancing of state, federal, and tribal interests might be appropriate in light of the traditional preemption analysis typically employed in this area. In its amicus brief in *Ramah Navajo*

(Continued on following page)

important role of Congress in Indian affairs make it imperative the states not be allowed to impose uncoordinated and detrimental taxes on the fledgling Indian commerce which Congress has pledged to encourage.

It is respectfully submitted that the language of the Constitution as well as subsequent history dictates that the six-prong test of *Japan Line, Ltd.* be applied to not only commerce "with foreign nations" but to that "with the Indian tribes" as well.

CONCLUSION

The history of the relationship between Indian tribes and the federal government and their potential adversarial role with the states, indicates that the Framers of the Constitution intended Congress have the exclusive power to regulate Indian commerce. Any potential burden imposed by the states on commerce "with the Indian tribes," must be limited by the six-pronged test of *Japan Line, Ltd.* Otherwise state interference will prevent the nation from "speaking with one voice" on a subject vested with federal interest.

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School Board, Inc. v. Bureau of Revenue, 458 U.S. 832 (1982) the United States also argued the Commerce Clause presumptively shelters on-reservation activities or transactions from state taxation or interference.

Dated: June 29, 1988.

Respectfully submitted,

BRUCE DOUGLAS BLACK*
Campbell & Black, P.A.
Post Office Box 2208
Santa Fe, New Mexico
87504-2208
Tel. [505] 988-4421

JOHN K. MANGUM
Nielsen & Senior
Post Office Box 11808
Salt Lake City, Utah 84147
Tel. [801] 532-1900

KEVIN N. ANDERSON
Fabian & Clendenin
215 S. State Street
Salt Lake City, Utah
84111-2309
Tel. [801] 531-8900

ALAN L. SULLIVAN
Van Cott, Bagley,
Cornwall & McCarthy
50 S. Main Street
Post Office Box 45340
Salt Lake City, Utah 84144
Tel. [801] 532-3333

*Counsel of Record

AMICUS CURIAE

BRIEF

(8)

No. 87-1327

IN THE
Supreme Court of the United States
October Term 1987

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,
v.
STATE OF NEW MEXICO, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF AMICUS CURIAE, THE NAVAJO TRIBE OF INDIANS, IN SUPPORT OF APPELLANTS

PAUL E. MINES
NAVAJO NATION
DEPARTMENT OF JUSTICE
MICHAEL P. UPSHAW,
Attorney General
P.O. Drawer 2010
Window Rock, Arizona 86515
(602) 871-6343/48
Counsel for Amicus Curiae, The Navajo Tribe of Indians

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Does the Commerce Clause require apportionment or allocation of New Mexico's five oil and gas taxes imposed on a Jicarilla Indian Reservation oil and gas lessee who is also subject to two Jicarilla Apache Tribe oil and gas taxes, when New Mexico provides only a small fraction of the Reservation's essential governmental services and when the combined effect of the state and tribal taxes is to increase by 75% the on-Reservation tax burden?

2. Do the federal laws and policies protecting Jicarilla tribal self-government and promoting Jicarilla Indian Reservation economic development preempt New Mexico's oil and gas taxes levied on an oil and gas lessee of the Jicarilla Apache Tribe?

3. Does the Commerce Clause require that an Indian Tribe be treated as a state for purposes of determining whether a state tax on non-tribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe?

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No. 87-1327

IN THE

Supreme Court of the United States

October Term 1987

COTTON PETROLEUM CORPORATION, *et al.*,

Appellants,

v.

STATE OF NEW MEXICO, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF AMICUS CURIAE, THE NAVAJO TRIBE OF INDIANS, IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Navajo Tribe of Indians (the Navajo Tribe) is a federally recognized Indian tribe and is the largest such tribe in the United States, comprised of approximately 173,000 members and occupying approximately 25,000 square miles of trust lands within three states, Arizona, New Mexico and Utah (the Navajo Nation).

Much of the wealth of the Navajo Tribe is attributable to natural resources occurring within the Navajo Nation. In today's depressed natural resource market, extraction of the Navajo Tribe's natural resources is generally limited to oil, gas and coal. Royalties and natural resource based tax revenues attributable to Navajo oil, gas and coal annually account for approximately eighty percent (80%) of the general fund of the Navajo Tribe of Indians.

The general fund, together with contracts and grants, such as those made under Pub.L. 93-638, 88 Stat. 2203 (1975), provide the financial basis for the Navajo Tribe to provide essential governmental services to the residents of the Navajo Nation, including police, fire, courts, health, social welfare, community development, economic development, education, child development, natural resource, water resource, and other miscellaneous services.

The Navajo Tribe of Indians is mindful of the federal policy to promote tribal self-government through self-sufficiency and economic development and the federal government's desire to reduce Indian dependence upon the federal government. In reaction to these policies, the Navajo Tribe through its Commission to Accelerate Navajo Development Opportunities ("CANDO") has recently embarked on an ambitious program of economic development within the Navajo Nation. To date, for fiscal year 1988, the Navajo Tribe has appropriated over $20 million to support this economic development effort.

In the Navajo Tribe's view, the State of New Mexico's position on taxation adversely affects Navajo tribal government, self-sufficiency and economic development.

1. Some existing mineral leases restrict amounts which the Navajo Tribe may receive in royalties and/or tribal taxes, by reference, among other things, to the level of existing state taxation.

2. State taxation acts as a barrier to tribal economic development. Prospective outside developers have expressed a reluctance to commit to projects which face "dual taxation" by two separate sovereigns, the Tribe and a state.

3. The presence of state taxation within the Navajo Nation impacts the tax policy of the Navajo Tribe. The Navajo Tribe has no control over state tax policy which is driven by state-wide needs. In addition, the Navajo Nation lacks a uniform tax policy, because three different states, Arizona, New Mexico and Utah, substantially affect the tax policy of the Navajo Nation

4. New Mexico taxation diverts tax revenues attributable to tribally owned natural resources to the state for ultimate appropriation by the state legislature. The New Mexico state legislature is too far removed to understand the priorities and needs of the Navajo Tribe.

5. The limited Navajo tax program, like most Indian tax programs, is in its infancy, only having been approved by this Court in 1985. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985). The failure of the Navajo tax program to occupy the entire field in local situs taxation reflects a tribal commitment to sound management in Indian taxation and not any conscious choice of deferring to existing forms of state taxation. The New

Mexico tax burden necessarily limits the ability of the Navajo Tribe to adopt additional taxes as it determines such action is warranted.

6. New Mexico's taxation adversely affects the Navajo Nation's natural resource development and operation.

7. Finally, the Navajo Tribe is adversely affected by any continuing ambiguity inherent in the Court's decisions regarding the permissibility of state taxation of on-reservaton activities of non-members. The Navajo Tribe seeks this Court's clear pronouncement on the application of state taxation to Indian affairs.

SUMMARY OF ARGUMENT

It should not be a remarkable ruling for the Court to hold that a state may not add a tax surcharge to the cost of goods in commerce which a non-member produces on an Indian reservation in cooperation with the resident tribe. The Court has available doctrines by which such taxes can be invalidated, including federal Indian preemption and the Commerce Clause. Your Amicus respectfully submits it is preferable for the Court to rule in this case under federal Indian preemption, because clear precedent exists under federal Indian preemption to invalidate the state taxes in issue. Once appellant showed that it was engaged in an on-reservation, oil and gas operation under a comprehensive scheme of federal regulation, it was incumbent upon New Mexico to justify its regulation or taxation of the on-reservation activity. New Mexico did not meet its

burden. In addition, state taxation of exhaustible resources is economically and non-economically adverse to established federal/tribal interests. The Court should clearly state its holding so a secure legal environment exists to promote tribal self-government through self-sufficiency and economic development.

ARGUMENT

I. NEW MEXICO'S SEVERANCE TAX AND EMERGENCY SCHOOL TAX ARE UNLAWFUL UNDER EITHER COMMERCE CLAUSE OR FEDERAL INDIAN PREEMPTION ANALYSIS, BECAUSE NEW MEXICO'S TAXES LACK A SUBSTANTIAL NEXUS, IMPOSE AN IMPERMISSIBLE MULTIPLE BURDEN AND ARE NOT FAIRLY APPORTIONED.

A. *Introduction.*

The ruling sought in this case is hardly dramatic: A state may not impose a tax surcharge against goods produced by on-reservation, economic activity of a non-member in cooperation with the resident tribe. Such state taxation frustrates, or has the potential to frustrate, the overriding goal of tribal self-government through self-sufficiency and economic development.

Under the established precedent of the Court, your Amicus respectfully submits that the taxes in issue[1] fail. The taxes fail, because under either commerce clause

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[1] New Mexico Oil and Gas Severance Tax, N.M. Stat. Ann. § 7-29-1 *et seq.* (1986 Repl.); New Mexico Oil and Gas Emergency School Tax, N.M. Stat. Ann. § 7-31-1 *et seq.* (1986 Repl.).

analysis or federal Indian preemption analysis New Mexico's taxes lack a substantial nexus, impose an impermissible multiple burden and are not fairly apportioned.

The identity of result from these two different methods of analysis obtains from the fact that this Court's Commerce Clause principles and preemption principles essentially seek to limit a state from overreaching to regulate [or tax] an activity to the detriment of overriding federal interests which either the Commerce Clause protects or federal Indian preemption protects. Under the Commerce Clause, the federal interest promoted, among other things, is free trade. *E.g., McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1940). The federal interest promoted under federal Indian preemption is the furthering of tribal self-government through tribal self-sufficiency and economic development. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983). The federal interest safeguarded by federal Indian preemption more specifically includes the protection of a tribe's power to manage the use of its territory and its resources by both members and non-members alike and to regulate economic activity within the Tribe's own reservation. *Mescalero, supra* at 335-336.

The similarity of the Commerce Clause analysis and the federal Indian preemption analysis can be briefly noted:

1. Commerce Clause analysis requires a state to have a substantial nexus to the subject being taxed. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 277-278, 287 (1977). The federal Indian preemption equivalent to nexus requires a state to make a special showing of its interest in order to assert jurisdiction over on-reservation affairs. *Mescalero, supra* at 334; *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083, 1092 (1987).

2. Commerce Clause analysis requires the state tax to be fairly apportioned to the activity being taxed. *Complete Auto, supra* at 287-288. The federal Indian preemption equivalent to fair apportionment ordinarily analyzes whether state services used to justify state taxation are related to the subject matter of the state tax being challenged. *Mescalero, supra* at 336; *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845 at n. 10 (1982).

3. Commerce Clause analysis requires a state tax not to discriminate against interstate commerce—the state tax must be internally consistent and not carry the risk of multiple tax burdens. *Complete Auto, supra* at 277-278, 287; *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 107 S. Ct. 2810, 2819-2820 (1987). Federal Indian preemption also prevents multiple burdens. *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965); *Mescalero, supra* at 339-340.

4. Commerce Clause analysis requires the state tax to be fairly related to the state services afforded. *Complete Auto, supra* at 277-278 and 287. This factor is closely allied to the nexus factor. The fairly related factor requires the measure of a state tax to be reasonably related to the taxpayer's presence or activity in a state. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625-626 (1981). Federal Indian preemption generally requires any exercise of state authority which additionally burdens a tribal en-

terprise[2] to be justified by off-reservation effects of the tribal enterprise necessitating state intervention. *Mescalero, supra* at 336; *Ramah, supra* at 843 and 845 at n. 10.

The similarity of Commerce Clause analysis to federal preemption analysis[3] may account for Appellant Cotton Petroleum Corporation's description of federal Indian preemption as a "backdrop" to its Commerce Clause challenge. (Jurisdictional Statement, App. 4). The analogy suggests New Mexico's taxes would not survive Commerce Clause review.[4]

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2 The Court used the term tribal enterprise in this context generically and not as referring to a specific business operation run by a tribe. This meaning is clear from the next sentence of the Court which states raising revenues is an insufficient reason for taxing a transaction between a tribe and a non-member.

3 The foregoing analogy relies on the Court's established procedure for reviewing state taxation of interstate businesses. This is not the only parallel which can be made under the Commerce Clause to federal Indian preemption cases. *See* Laurence, "The Indian Commerce Clause," 23 Ariz. L.Rev. 203 (1981); Feldman, "Preemption and the Dormant Commerce Clause: Implications for Federal Indian Law," 64 Or. L. Rev. 667 (1986).

The Court's footnote 26 in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 158-159 (1982), also suggests the parallel by noting, "the multiple taxation issue would arise only if a *State* attempted to levy a tax . . . , which is more that the *State's* contact with the activity would justify."

4 The grounds which would appear most easily to invalidate New Mexico's taxes under commerce clause analysis are (i) the absence of a substantial nexus because New Mexico has not demonstrated any substantial interest in regulating on-reservation, economic activities of a non-member where reservation value is generated in cooperation with the resident tribe; (ii) a lack of fair apportionment resulting from taxing the same local activity which the Court recognized was entirely within tribal jurisdiction, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 158

(Continued on following page)

B. While The Commerce Clause Affords A Basis For Invalidating New Mexico's Taxes, Existing Federal Indian Preemption Principles Do So Also Without The Need For New Precedent.

The parallels which exist between the Court's established Commerce Clause analysis and the Court's federal preemption analysis readily suggest either approach may afford sufficient basis for invalidating New Mexico's taxes in this case. Your Amicus leaves to others, however, the task of arguing the Commerce Clause. Your Amicus respectfully submits this matter is better decided on the basis of federal Indian preemption for several reasons.

First, existing precedent fully supports the invalidation of New Mexico's taxes; there is no need to break new ground. Indeed this case presents an opportunity for the Court to clarify its established precedent. Second, a decision based upon the Interstate Commerce Clause weakens the effect of the Court's decision insofar as it might pertain to on-reservation, economic activities which are not viewed as being in interstate commerce. Third, Indian tribes have an immediate need to be competitive with the surrounding states. Tribes face a disincentive to development, because any legitimate economic endeavor of a non-member who locates, and generates value, on an Indian

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(Continued from previous page)

at n. 26 (1982); and (iii) discrimination resulting from a state tax surcharge or multiple tax burden being placed on reservation goods which is not applicable to nonreservation goods. *See American Trucking Ass'ns, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987).

If federal Indian preemption is based upon the Indian Commerce Clause, the entire preemption analysis is presumably incorporated into the Commerce Clause. *Merrion*, supra at 153-154.

reservation must comply not only with tribal tax law but also with state tax law. Fourth, new Court pronouncements tend to be tentative. Indian tribes do not have the luxury of waiting for further refinements of a new legal doctrine to promote their tribal self-government, self-sufficiency and economic development.

C. New Mexico May Not Tax The On-Reservation Activities Of A Non-Member Which Generate Reservation Value And Which Are Carried On Pursuant To A Comprehensive Scheme Of Federal Regulation, Because New Mexico Has Not Satisfied Its Burden Of Justifying Such Taxation And Because Such Taxation Adversely Affects Federal/Tribal Interests.

Notwithstanding the "particularized inquiry" dictated by the Court in federal Indian preemption cases, *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1980), the Court has stated the principles which govern the federal Indian preemption analysis enough times that there can be no reasonable debate over the standard by which state taxation of non-members engaged in on-reservation activities is judged. The irony which remains in the face of these fixed principles is that many lower courts refuse to abide by them. *Crow Tribe of Indians v. Montana,* 469 F. Supp. 154 (D. Mont. 1979), *rev'd,* 650 F.2d 1104 (9th Cir. 1981), *amended,* 665 F.2d 1390 (1982), *on remand,* 657 F. Supp. 573 (D. Mont. 1985), *rev'd,* 819 F.2d 895 (9th Cir. 1987), *aff'd,* 108 S. Ct. 685 (1988). ("The district court's legal conclusions deviate from this court's 1981 opinion and misapply recent Supreme Court cases that establish the relevant preemption analyses." 819 F.2d at 898). It is not surprising that the New Mexico

state courts in this case also have given only lip service recognition to the correct federal Indian preemption principles.

A brief review of the applicable federal Indian preemption principles vividly indicates the failure of the New Mexico Court of Appeals to make a bona fide attempt to analyze this case under applicable precedent. (Jurisdictional Statement, App. 10-12).

State law does not presumptively apply to an Indian reservation, if Congress has failed to prohibit its application expressly. *California v. Cabazon Band of Mission Indians,* 107 S.Ct. 1083, 1092 at n.18 (1987).

To determine the possible application of state law to an Indian reservation, a particularized inquiry is made in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including the overriding goal of encouraging tribal self-sufficiency and economic development. *Id.* at 1092.

State law is preempted if it interferes or is incompatible with federal and tribal interests reflected in a comprehensive scheme of federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334 (1983).

Protected federal and tribal interests include an Indian tribe's power to manage the use of its own territory and resources by both members and non-members and to undertake and regulate economic activity within its reservation. *Mescalero, supra* at 335.

Concurrent state jurisdiction is potentially disruptive to federal/tribal interests, because it can impose inconsistent regulatory duality and because state policy which reflects state-wide interests is not necessarily appropriate for an Indian reservation. *Mescalero, supra* at 339-340.

A state's general desire to raise revenues will not justify the application of a state tax to an on-reservation transaction between a tribe and a non-member. *Mescalero* at 336.

The provision of state services used to justify state taxation should be related to the subject matter of the state tax being asserted. *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico,* 458 U.S. 832, 845 at n.10 (1982).

The exercise of state authority which imposes burdens on a tribal enterprise must ordinarily be justified by state functions or services performed by a state in connection with the on-reservation activity. *Mescalero, supra* at 336.

A state's regulatory interest is particularly strong when it can point to off-reservation effects of the on-reservation activity which necessitates state intervention. *Mescalero, supra* at 336. A state's taxing interest is strongest, therefore, when the tax is directed at off-reservation value and the taxpayer receives state services. *Washington v. Confederate Tribes of the Colville Indian Reservation,* 447 U.S. 134, 157 (1980).

The purpose of developing an Indian tribe's oil and gas resources under the *Mineral Leasing Act of 1938,* 25 U.S.C. § 396a *et seq.*, among other things, is to maximize tribal revenues and to promote regulatory uniformity. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 767 at n.5 (1985).

This short listing of the Court's established principles leave no room to uphold the decision of the New Mexico Court of Appeals. Although, the New Mexico Court of Appeals states it has applied traditional [preemption] rules to determine the validity of the New Mexico taxes under attack (Jurisdictional Statement, App. 12), it has done nothing of the kind.

New Mexico Court of Appeals has totally ignored the following facts:

1. Oil and gas development on an Indian reservation is subject to comprehensive federal regulation which is in aid of the overriding federal goals of tribal self-sufficiency and tribal economic development. Indeed, the presence of a comprehensive federal regulatory scheme would appear to be present in all events, where a tribe can establish it is promoting legitimate on-reservation economic activity which generates reservation value for the purpose of promoting economic development. After all, the need to establish the presence of comprehensive federal regulation is not intended to thwart the push for tribal self-government. *Ramah, supra* at 845-846.

2. New Mexico's taxes are directed at on-reservation value. N.M. Stat. Ann. § 7-29-4.1 (1986 Repl.); N.M. Stat. Ann. §§ 7-31-2 (D) and 7-31-5 (1986 Repl.).

3. New Mexico performs no substantial governmental service for Cotton Petroleum Corporation's reservation based oil and gas operations.

4. With the possible exception of New Mexico's Oil and Gas Conservation Tax, N.M. Stat. Ann. § 7-30-14 (1986 Repl.) (current version at § 7-30-14 (1987 Supp.)), New Mexico taxes are not related to the provision of services which New Mexico argues are justification for the taxes asserted.

The New Mexico Court Appeals, instead of acknowledging these undisputed facts and principles, based its entire finding of no federal Indian preemption upon an alleged failure of proof. The New Mexico Court of Appeals apparently will not find preemption unless the party challenging the state taxes establishes that the state taxes adversely impact the complaining tribe financially. (Jurisdictional Statement, App. 11-12). Your Amicus quarrels with the reasoning on several important grounds.

First, the New Mexico Court of Appeals has ignored the fact that the Court has invalidated state taxes or regulation in Indian country on the *exercise* of state authority. The Court does not analyze whether state policy is better or worse than federal/tribal policy. Preemption is based upon the presence of a comprehensive scheme of federal regulation which is supportive of the federal/tribal interests. There is simply no room to allow state authority to be exercised in this environment. *Warren Trading Post, supra* at 690. The invalidation does not arise solely from an adverse financial impact. *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 156 (1980); *Warren Trading Post, supra* at 691 ("This state tax . . . would put financial burdens on [the taxpayer] *or* the Indians . . . in addition to those Congress or the tribes have prescribed, and *could* thereby disturb the statutory plan [of Congress] . . . ." (Emphasis added)); *see also White Mountain Apache, supra* at 158-159 (state financial burden of less than 1% of total annual profits of tribal enterprise not allowable) (dissenting opinion).

Indeed, your Amicus seriously doubts the State of New Mexico would be pleased with a federal Indian preemption rule which was based on financial impact. Renegotiation of existing mineral leases or a tribal tax system giving a credit for state taxes not yet successfully challenged could easily make a tribal owner of natural resources incur financial adversity from the imposition of existing states taxes.

Second, the New Mexico Court of Appeals has ignored the burden which the states have to justify their taxes where the complaining party has established potential interference with tribal interests if a state exercises authority over on-reservation activities.[5] The Court's precedent clearly places the burden of justification upon *the state. Mescalero, supra* at 334. New Mexico, a non Pub. L. 280 state, has done nothing to demonstrate its protected interest in this case. New Mexico has not shown it has been "shortchanged" for its services. At best, New Mexico's position rests on a need for general revenues.

Third, no one would seriously propose the New Mexico taxes, as direct taxes on natural resource production, cannot have a *potential* adverse impact on a tribal owner of these resources. Indeed, New Mexico would undoubtedly distinguish *Crow Tribe of Indians v. Montana,* 819 F.2d

[5] The New Mexico Court of Appeals may have placed the burden on the taxpayer as a result of the normal state tax rule that the actions of a state tax agency are presumed to be correct. *Cf.* N.M. Stat. Ann. § 7-1-5 (G)) (1986 Repl.).

895 (9th Cir. 1987), *aff'd*, 108 S. Ct. 685 (1988), as a case where state taxation actually adversely affected coal production from tribal lands. Yet a distinction based upon actual prejudice is illusory. Federal Indian preemption cannot logically depend upon transitory market conditions. State statutes interfere with federal/tribal interests, not because of transitory outside market conditions, but because of inconsistent state legislative objectives. Given the years it takes to prepare and bring a successful legal challenge to state law based upon federal Indian preemption, it is inconceivable that the preemption would be dependent upon market conditions which can change rapidly.[6]

Fourth, New Mexico's economics is unsupported by basic economic theory. Economists are virtually unanimous in documenting the adverse effects felt by the natural resource owner from taxes on the output of exhaustible resources. In the appendix to this brief (App. 2-8) is a brief description and listing of the applicable economic literature. Succinctly stated, economic theory shows state taxes on the output of exhaustible resources:

A. Will decrease the total amount of the resource which will be extracted over the life of an extractive operation;

B. Will decrease the amount of the resource which is extracted in any given year;

C. Will decrease the amount of exploration and development which is conducted; and

D. On any lease renegotiation, will decrease the royalty rate received by the resource owner.

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6 Recent history forcefully evidences the volatility of the oil and gas market.

In addition, producers operating in taxing jurisdictions which cannot influence prices are unable to pass the incidence or burden of output taxes onto the consumer, since the price is established by outside forces. This fact means that New Mexico oil and gas producers, as "price takers" and not "price makers," will in the long run place the incidence or burden of New Mexico output taxes on the owner of the resource.

In conclusion, your Amicus respectfully submits that a correct statement of federal Indian preemption in this case would be as follows:

> Under current federal Indian policy a comprehensive scheme of federal regulation exists to promote tribal self-government, self-sufficiency and economic development. Therefore if a tribe or other complaining party establishes a legitimate economic on-reservation endeavor to produce reservation goods or value by a nonmember in cooperation with the resident tribe, any state seeking to tax or regulate that endeavor must clearly establish its specific interest which would justify state intrusion. If a state seeks to justify its tax in such circumstances by the provision of state services, such services must be directly tied to the economic activity being taxed and such services themselves must not interfere with federal or tribal interests. Reliance on state services which are provided generally to all residents of the state will not suffice. A state has a heavy burden to justify the taxation of on-reservation, economic activities producing reservation goods or value.

II. YOUR AMICUS RESPECTFULLY REQUESTS THE COURT TO STATE CLEARLY AND CONCISELY THE PRINCIPLES EVOLVED FROM PRIOR "PARTICULARIZED INQUIRIES" WHICH PRECLUDE A STATE FROM IMPOSING TAXES ON THE ON-RESERVATION, ECONOMIC ACTIVITIES OF NON-MEMBERS.

The Navajo Tribe of Indians respectfully submits that this case affords no reasonable basis for upholding the application of the taxes in issues to Cotton Petroleum Corporation's on-reservation activities. The fact that the New Mexico Court of Appeals concluded otherwise after applying "traditional analysis" (Jurisdictional Statement, App. 12) evidences unnecessary confusion lower courts are experiencing in applying the established principles of the Court.

The confusion may result from this Court's "particularized inquiry," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), which the courts and parties inevitably view as requiring an in-depth, factually intensive, examination of all circumstances of each instance where a challenge is being made to the application of state taxation to on-reservation activities. Your amicus respectfully submits this interpretation of the "particularized inquiry" has been demonstrated above to be erroneous.

The Court's earlier opinions have focused so much on the source of the principles that observers have lost sight of the principles themselves. The Navajo Tribe believes the Court's earlier decisions have already establieshd a clear starting point for examining the validity of New Mexico's challenged taxes in this case. There is no need to start the

particularized inquiry from point zero. This case represents an excellent opportunity for the Court to state, without the elaboration necessary in the earlier seminal decisions, the applicable principles for determining the validity of state taxes as applied to on-reservation, economic activities of non-members generating reservation goods or value in cooperation with the resident tribe. By issuing a strongly worded opinion the Court will not depart from its precedent and will hopefully foreshorten the litigation process which many now urge is necessary.

Your Amicus suggests the Court adopt the foregoing action knowing that this Court has rejected an earlier request for clarification and simplification[7] for a number of reasons:

1. Unlike the earlier request, this request does not seek a departure from the Court's established precedent; it merely seeks a change in emphasis.

2. The Court's precedent has been outstanding for several years. The states are aware of the implications and requirements for state taxation of on-reservation, economic activities. There has been significant opportunity for the states to respond legislatively to any perceived need for change.

3. Congress likewise has had notice of the Court's prior rulings. Congress has the ability to deal with the issues presented, if it believes the Court has misinterpreted federal policy or believes that a change in federal Indian policy may be necessary.

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[7] *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 845-846 (1982).

4. Indian tribes must immediately fulfill their governmental responsibility to develop tribal self-government, self-sufficiency and economic development. *See California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083, 1092 at n.20 (1987). Allowing state taxation of the type here challenged unduly restricts the ability of Indian tribes to develop Indian solutions for Indian problems. Income or wealth attributable to the development of Indian owned resources or on-reservation generated value should be available to support Indian tribal government without intrusion by the states.

5. Jurisdictional litigation with the states is time consuming and depletes a tribe's limited resources. If a tribe must engage in 4 to 5 years of litigation before it can be certain of the extent of its governmental authority with regard to every assertion of state authority, almost every innovative move of tribal government will face a period of uncertainty. The mere existence of uncertainty undermines a tribe's ability to function and attract outside (private) entrepreneurial assistance.

6. Even if New Mexico were able to demonstrate that every dollar it raises from on-reservation activity is returned to benefit the resident tribe, a fact certainly not present in this case, it is unseemly that a state legislature could decide for a tribe how tax revenues attributable to reservation generated value should be used. The Appendix to this brief (App. 1-2) contains a brief comparison of the demographic characteristics of the Navajo Reservation population within New Mexico with the State of New Mexico as a whole based upon the 1980 census. In the face of this data, your amicus respectfully submits it is inconceivable that the New Mexico State Legislature could begin to be sensitive to the very basic needs these Indian demographic statistics reflect. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983).

7. The above objections are not cured by noting that Indians can lobby the New Mexico government. Political reality is otherwise. American Indians constitute but 8.1% of the general population (App. 1) (In the Navajo Tribe's case, political influence is lessened by the fact its population is split among three states.); tribal governments are not integrated into state finances while the state and its political subdivisions are (N.M. Const., Art. VIII, Section 10; N.M. Stat. Ann. §§ 7-1-6.1 through 7-1-6.23 (1986 Repl.)); state constitutional restrictions prevent New Mexico from effectively dealing with tribal governments which are acknowledged as the legitimate governmental representatives of their members (N.M. Const., Art. IV, Section 31); and Indians are only now becoming integrated to the political process in New Mexico. See *Montoya v. Bolack*, 70 N.M. 196, 372 P.2d 387 (1962) (challenges to Indians voting in state elections occurred up to 1962).

In the face of the foregoing your Amicus respectfully submits this court should announce a shortened statement of why New Mexico's state taxes fail in this case. This statement would have the salutory effect of clearly placing the states and the lower courts on notice as to the limited circumstances in which states may tax on-reservation, economic activities of non-members.

CONCLUSION

For the foregoing reasons, your Amicus respectfully urges this Court to reverse the decision of the New Mexico Court of Appeals and hold that the State of New Mexico may not lawfully impose its severance tax and emergency school tax.

Dated: June 29, 1988.

Respectfully submitted,

PAULL MINES
NAVAJO NATION
DEPARTMENT OF JUSTICE
MICHAEL P. UPSHAW,
Attorney General
P.O. Drawer 2010
Window Rock, Arizona 86515
(602) 871-6343/48
Counsel for Amicus Curiae,
The Navajo Tribe of Indians

APPENDIX

COMPARATIVE 1980 CENSUS STATISTICS FOR THE NEW MEXICO PORTION OF THE NAVAJO INDIAN RESERVATION AND THE ENTIRE STATE OF NEW MEXICO

VARIABLE	NM NAVAJO RESERVATION	STATE OF NEW MEXICO
% American Indian Population	28,762 (97.2%) GPC-T55	105,976 (8.1%) GPC-T15
Median Age	19.3 yrs. SE-T192	27.4 yrs. SE-T62
% persons 5+ years who speak a language other than English at home	92.0% SE-T192	37.8% SE-T63
% persons 25+ yrs. with less than 5 yrs. of school	31.6% SQ-T7	5.6% SE-T61
Nonworkers per 100 workers	270 SE-T193	131 SE-T57
Per capita income in 1979	$2,605 SE-T193	$6,119 SE-T71
Median household income	$8,976 SE-T193	$14,654 SE-T61
Median family income	$9,718 SE-T193	$16,928 SE-T61
% persons less than poverty level in 1979	46.2% SE-T193	17.6% SE-T61
% persons less than 200% poverty level in 1979	75.2% SQ-T29	42.2% SE-T72
% persons 65+ years less than poverty level in 1979	63.0% SQ-T5 SQ-T29	20.6% SE-T62 SE-T72
% of occupied housing units (OHU's) lacking plumbing for exclusive use	39.4% SQ-T11	3.6% GHC-T1
% OHU's connected to public sewer	35.0% SQ-T32	73.3% DHC-T54

% OHU's without central heating	70.7%	SQ-T11	25.7%	DHC-T54
% OHU's with no telephone	72.3%	SQ-T11	14.0%	DHC-T61
% OHU's with families less than poverty level	47.3%	SQ-T33	17.2%	DHC-T62
% OHU's with complete kitchen facilities	59.4%	SQ-T32	95.2%	SE-T61

NOTES: Data for NM Navajo Reservation is Indian residents only. Data for State of New Mexico includes all races. "T" designates table number. "GPC" designates publication *General Population Characteristics for NM, '80 Census* (PC 80-1-B33). "SE" designates publication *General Social and Economic Characteristics for NM, '80 Census* (PC 80-1-C33). "SQ" designates publication *Amer. Indians, Eskimos and Aleuts on Identified Reservations and in the Historic Areas of Oklahoma, '80 Census* (PC 80-2-ID (2 parts)). "GHC" designates publication *General Housing Characteristics for NM, '80 Census* (HC 80-1-A33). "DHC" designates publication *Detailed Housing Characteristics for NM, '80 Census* (HC 80-1-B33).

ECONOMIC ANALYSIS OF THE IMPACT AND INCIDENCE OF TAXES ON THE OUTPUT OF NON-RENEWABLE RESOURCES

Introduction. Over the last 70 years, economists who have analyzed the impact and/or the incidence of taxes on the output of non-renewable resources have been remarkably consistent (for economists) in their conclusions.

Taxes on the output of non-renewable resources (severance taxes, sales taxes, gross proceeds taxes, *etc.)* will have the following impacts: (1) they will, except in highly unusual circumstances, affect the "extraction profile"

(the amount of the resources that will be extracted per unit of time from a given deposit); (2) they will affect the total amount of the resources that will be extracted from a given deposit over the economic life of the extraction operation (the "high-grading" effect); (3) they will affect the amount of investment to develop new deposits in the same taxing jurisdiction; and (4) they will, in the long run, when royalty rates are renegotiable, affect the royalty rate offered to owners of the resource.

In addition, economists are uniform in their conclusion that the incidence of these taxes will ultimately fall upon owners of the resources rather than producers or consumers.

A Note on Economic Methodology. All of the economists cited in this survey of the literature employed a theoretical method called "comparative statics" to reach their conclusions. This method entails comparing predicted behavior in two hypothetical situations which differ in only one respect: in one situation the tax under consideration is absent, and in the other situation the tax under consideration is present; all other conditions affecting the analysis are assumed to be identical. In this way, the effects of imposing a particular tax can be isolated for analysis. The conclusions reached cannot be empirically proved or disproved, because controlled experiments are not possible in the field of economic policy. The conclusions should be valid regardless of current market conditions and observed behavior, because the conclusions in effect say that actual extraction at any point in time under a severance tax is less than what extraction would be at the same point in time in the absence of a severance tax.

Accepted Economic Conclusions Regarding the Impact of Taxes on the Output of Non-Renewable Resources. Economists are unanimous in concluding that, except for the highly unusual circumstance in which the rate of resource price inflation exactly equals the resource producer's internal discount rate (or rate of interest), taxes on the output of non-renewable resources will affect the rate at which resources will be extracted from a given deposit. In most cases, the direction of this impact will be to reduce the present rate of extraction in favor of future extraction (this is often called "conservation"). In addition, such taxes will affect the size of economically recoverable reserves. In most cases, the direction of this impact will be to reduce the size of economically recoverable reserves.

The literature supporting these conclusions is:

Gray (1914) at p. 487;

Hotelling (1931) at p. 165;

Lockner (1962) at p. 341;

Conrad & Hool (1980) at p. 54;

Church (1980) at pp. 67, 71-72 and 73;

Conrad & Hool (1981) at p. 18;

Conrad (1982) at pp. 531-532;

Mieszkowski & Toder (1983) at pp. 72, 73 and 74; and

Gamponia & Mendelsohn (1985) at 165.

In their analyses of taxes on non-renewable resources, economists have been primarily interested in the impact of these taxes on extraction rates and economically recov-

erable reserves. However, a few analysis have also looked at long-run impacts on the volume of investment for development of new reserves and on royalty rates (when these can be renegotiated). Their conclusions can be summarized as follows: Severance taxes reduce the rate of investment in new wells or mines from what it would be in the absence of severance taxes and severance taxes will reduce renegotiated royalty rates from what they would be in the absence of severance taxes.

The literature supporting these conclusions is:

Conrad & Hool (1980) at pp. 56 and 69; and

Ranck (1985) at p. 243.

Conclusions Regarding the Incidence of Taxes on the Output of Non-Renewable Resources. Economists who have analyzed the incidence or burden of taxes on the output of non-renewable resources are unanimous in concluding that, in the long run, these taxes are borne by the owners of the resource.

The literature supporting this conclusion is:

McClure (1978) at p. 257;

Church (1981) at pp. 103, 106 and 108;

Conrad (1982) at pp. 533-534; and

Gamponia & Mendelsohn (1985) at p. 177.

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AMICUS CURIAE

BRIEF

No. 87-1327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*,
Appellees.

On Appeal from the Court of Appeals of New Mexico

BRIEF OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

HARRY R. SACHSE *
DONALD J. SIMON
SONOSKY, CHAMBERS & SACHSE
1250 Eye Street, N.W.
Washington, D.C. 20005
(202) 682-0240
Counsel for Assiniboine and Sioux Tribes of the Fort Peck Reservation

June 30, 1988

* Counsel of Record

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INTEREST OF AMICI

The Assiniboine and Sioux Tribes of the Fort Peck Reservation are federally recognized Indian tribes with a reservation of approximately two million acres in northern Montana. The Tribes have approximately 8,000 members, about 4,000 of whom live on the Reservation. Approximately half the land on the Reservation is owned in fee and fully taxed by the State.

The Tribes have an interest in this case because Montana, like New Mexico, is not content to tax mineral production only from fee lands, but also taxes such production from lands held in trust by the United States for the Tribes and their members.

As with other Indian tribes, most members of the Fort Peck Tribes live near or below the poverty level. While the Tribes have established successful manufacturing ventures, unemployment remains high. In response to these economic conditions, the Tribes have tried to develop the modest amount of oil there is on the trust land on the Reservation. In 1987, the Tribes received income of approximately $1,600,000 in rents, royalties and bonuses from oil production on tribal land, and $316,000 from tribal taxation of oil production on tribal and allotted trust lands.

The Tribes' mineral tax for a number of years was 2%. In 1987, with diminished revenues from royalties, and diminished federal support, the Tribes sought to raise their tax to match the Montana state severance tax, which was then 12.58%. The Tribes found, however, that this increase in the tribal tax would make the tax burden on the Reservation's oil production so high that some wells would be shut down and future development would be discouraged. The Tribes thus limited their tax increase only to 7%, with a credit for any combined tribal tax and royalty exceeding 27%.[1] In effect then, the Tribe's tax on a 25% royalty lease is 2%, while the state's tax is 12.58%.[2] A summary of state taxes, supplied to us by the State of Montana, is attached to this brief as Exhibit 1. Excerpts from the Tribal oil and gas tax ordinance are attached as Exhibit 2.

The Fort Peck Tribes are directly injured by Montana's taxation of oil produced on tribal or allotted land. The state tax forces upon the Tribes a Hobson's Choice. If the Tribes tax, they discourage oil and gas develop-

[1] Most royalties are at 12.5%, 16.66% or 25%, depending upon both the date of the lease and the negotiations between the Tribes or allottees, and the lessees.

[2] Until 1985, Montana taxes were permitted to be as high as 25% on tribal oil and gas.

ment on the Reservation because the tax burden resulting from the combination of state and tribal taxation is necessarily higher than the tax burden elsewhere in the state. If the Tribes do not tax, they lose a vital source of income. Moreover, as a result of state taxation, the Tribes lose the flexibility that other jurisdictions have to encourage economic development through tax incentives. As an underdeveloped area, the Tribes may wish to have lower taxes than elsewhere in the state, in order to encourage mineral development on the Reservation. This is impossible, however, because no matter how low the tribal tax, the full state tax remains, operating as a disincentive to the development of Reservation lands.

The Fort Peck Tribes thus urge that the judgment below be reversed on the ground that state taxation imposed on reservation mineral development is pre-empted by federal law and policy. Both parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

1. An Indian tribe is not a state for purposes of the Commerce Clause. Const. Art. I, Sec. 8, cl. 3. The Clause itself refers to commerce in three categories: "with foreign nations," "among the several States" and "with the Indian tribes." The Court has analyzed each category separately, because different interests are brought into play with each. As to Indian tribes, the Court in a series of cases has established standards for judging state attempts to tax activities within Indian reservations. Where states have attempted to tax non-Indians performing work for tribes, the taxes have been struck down if the activity is comprehensively regulated by the United States, the value of the activity is created on the reservation, and the state interest is limited to raising revenue. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (logging operations); *Ramah Navajo School*

Board v. Bureau of Revenue, 458 U.S. 832 (1982) (school construction). The same test should be applied to oil production.

2. Prior decisions of this Court do not support continued state taxation of tribal minerals. For over thirty years the Court did not permit such taxation. The Court's subsequent decision in *Oklahoma Tax Commission v. Texas*, 336 U.S. 342 (1949), addressed state taxation in a context of fixed royalty rates, no reservation, no tribal government, and no tribal taxation. In those circumstances the Court allowed Oklahoma to tax an oil company on production from trust property. The states have used that decision as general authority to impose severance, property and production taxes against producers of oil and gas on Indian land. But that case is now out of touch with the modern realities of tribal governments and oil and gas production. First, federal policy, including major new laws, emphasizes the importance of tribal governments and federal encouragement of tribal self-sufficiency. Second, this Court has recognized the tribal right and need to tax oil production from trust land. Third, Congress has recognized a new flexibility in negotiating lease terms. Finally, *Oklahoma Tax Commission* is inconsistent with this Court's opinions in *Bracker*, *Ramah* and other recent cases.

3. State taxation of tribal mineral development is pre-empted by federal law and policy. The test for pre-emption of state taxation set forth in *Bracker*, *Ramah*, and more recently in *California v. Cabazon Band of Mission Indians*, 480 U.S. ——, 94 L. Ed. 2d 244 (1987), is fully met here. The state has no interest except a general revenue interest. The value created is on the reservation—indeed it is the value of the very substance of the reservation, which once gone, is gone forever. Oil and gas extraction on Indian reservations is pervasively regulated by the United States, from leasing the wells to eventually plugging and abandoning them, from extracting the oil to accounting for it to paying the royalties. The federal regulation here is as pervasive as in the logging of reservation timber, or the operation of reservation educational systems. Based on *Bracker*, *Ramah*, and *Cabazon*, that degree of federal regulation conclusively precludes state taxation of non-Indian lessees developing trust minerals.

ARGUMENT

I. AN INDIAN TRIBE IS NOT A STATE FOR PURPOSES OF THE INTERSTATE COMMERCE CLAUSE AND THE PROPER TEST FOR STATE TAXATION IS THE PRE-EMPTION STANDARD APPLIED BY THE COURT IN *WHITE MOUNTAIN APACHE TRIBE v. BRACKER*.

The Court has added to the questions presented in this case the following question:

> Does the Commerce Clause require that an Indian tribe be treated as a state for purposes of determining whether a state tax on non-tribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian tribe?

485 U.S. ——, 99 L. Ed. 2d 696 (1988).

Our answer is that the Commerce Clause does not require or suggest that the apportionment principles of interstate commerce should be applied where a state seeks to tax a non-Indian entity for its activities on a reservation.

The Commerce Clause, Const. Art. I, Sec. 8, cl. 3, provides:

> The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The Constitution itself thus provides three separate categories of governments—foreign nations, states and Indian tribes—with which Congress may regulate commerce.

This Court early recognized these three categories as distinct. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831), the Court observed:

> In this clause they [Indian Tribes] are as clearly contradistinguishable by a name appropriate to themselves from foreign nations as from the several States composing the Union.

This Court has treated each category of government separately for purposes of defining the scope of Congress' authority over commerce. An elaborate structure, which we do not discuss here, has been created for handling questions of interstate commerce. *See* Tribe, *American Constitutional Law* 2d ed. 305-318. The Court has interpreted the foreign commerce clause as allowing less room for state taxation or regulation than with interstate commerce, because of the need for the Nation to speak with a single and uniform voice. *See Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

The source of plenary federal power over Indian tribes, and the concomitant lack of state power, arise both from the Commerce Clause and from the treaty making power. U.S. Const. Art. II, Sec. 2, cl. 2. In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), the Court described this federal power as follows:

> The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. *See* U.S. Const. Art. I, § 8, cl. 3; Art. II, § 2, cl. 2. *See also Williams v. Lee*, 358 U.S. 217, 219 n. 4; *Perrin v. United States*, 232 U.S. 478, 482 (1914); Federal Indian Law 3.

411 U.S. at 172 n.7.

Pursuant to these doctrines, the Court has developed a pre-emption analysis to determine the limits of a state's

authority within an Indian reservation. This analysis serves the same purpose as the different, but parallel, analyses for federal control over interstate and foreign commerce.

These differences were quite succinctly stated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), in a context similar to that now before the Court—a state's attempt to tax a logging company cutting logs on an Indian reservation. The Court specifically rejected the suggested analogy between an Indian tribe and a state, and expressly ruled out the idea of applying to Indian issues the pre-emption analysis used for issues of interstate commerce:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. *Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.* The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. . . . As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.

448 U.S. at 143 (citations omitted) (emphasis added). The Court then considered state regulation of on-reservation conduct involving only Indians:

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.

448 U.S. at 144.

The Court stated a different test where activities of non-Indians (such as the logging company in *Bracker*, or here, an oil company) are the issue. In such cases the Court has

> . . . examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence.

448 U.S. at 144-45.

In its most recent formulation of this test, the Court said that "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *California v. Cabazon Band of Indians*, 480 U.S. ——, ——, 94 L. Ed. 2d 244, 259 (1987) *quoting New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). In determining whether state regulation or taxation interferes with federal or tribal interests, the inquiry must be made "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Cabazon*, 94 L. Ed. 2d. at 259.[3]

In short, the Court has already considered—and explicitly rejected—the idea that Indian tribes should be considered as states for purposes of a Commerce Clause analysis. The Court has instead crafted a different test specifically for analysis of Indian issues, one designed to take into account the unique history and nature of tribes, and their special status as sovereign entities.

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[3] The Court held in *Bracker*, for instance, that the state tax at issue was pre-empted because of the extensive federal regulation of timber harvesting specifically designed to assure the best price to the Indians. *See infra* at p. 13.

II. PRIOR DECISIONS OF THIS COURT DO NOT SUPPORT CONTINUED STATE TAXATION OF TRIBAL MINERAL DEVELOPMENT.

From 1914 through 1946 this Court held as a matter of Constitutional law and intergovernmental tax immunity that states could not tax oil production on Indian lands, whether the tax was levied on the producer or the tribe. *Choctaw, Oklahoma & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914); *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522 (1916); *Gillespie v. Oklahoma*, 257 U.S. 501 (1922).

In a separate, non-Indian context, the Court subsequently struggled with claims of immunity from state taxation made by federal contractors relying on the federal instrumentality doctrine. The Court, in light of the immense tax base of the United States, saw no Constitutional requirement to protect the federal government from non-discriminatory state taxes on persons doing work for the United States. In a series of cases in the 1930's, the Court accordingly limited that immunity. *See, e.g., James v. Dravo Contracting Company*, 302 U.S. 134 (1937), and cases cited therein.

After the federal contractors lost their immunity from state taxation, the State of Oklahoma renewed its attempt to tax production of Indian oil.[4] The situation at that time was much different than it is now. Oil companies paid a standard one-eighth royalty. Tribes, while theoretically having the power to tax, did not use the power and had never taxed mineral production. Moreover, in Oklahoma, where these cases arose, tribal governments and reservations had largely been abolished and individual Indians owned the oil producing properties.

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[4] Virtually all tribal oil production at the time occurred in Oklahoma. The earlier cases barring state taxation of tribal oil production all took place in Oklahoma.

Under those circumstances, in *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), the Court, by analogy to cases concerning federal contractors in non-Indian contexts, held that Oklahoma could impose its 5% gross production tax and its one cent per barrel excise tax on oil produced by the Texas Company from allotted and restricted lands of "various members of the Pottawatomie, Apache, Comanche, and Otoe and Missouria Tribes" in Oklahoma. 336 U.S. at 334.

The Court apparently saw no real impact on the individual Indian lessees. *Id.* at 363. And since there was no reservation, no tribal government, and no tribal taxation at issue, the Court made no reference to the impact of state taxation on any of them.[5]

The states have used *Oklahoma Tax Commission* as general authority to impose state severance, property, and production taxes against producers of oil and gas on Indian land. This has been done without regard to the impact on tribal taxes or royalties, or to the policies of tribal governments seeking desperately to establish a tax base and achieve economic independence. But both the governing law, and the facts of tribal minerals development, have changed dramatically since 1949, and the *Oklahoma Tax Commission* case is an anachronism being stretched beyond recognition to sanction state taxation of oil production under circumstances never contemplated by the Court almost forty years ago.

First, federal policy since 1949 has evolved to recognize explicitly the responsibility and importance of tribal

[5] The leases were made before the Minerals Leasing Act of 1938, P.L. 75-198, 52 Stat. 347, 25 U.S.C. §§ 396a-396g, which is mentioned only in a footnote and is not discussed in the opinion. *See* 336 U.S. at 345 n.6. The brief of the Texas Company in *Oklahoma Tax Commission* states, at p. 14, that the leases in question were made pursuant to "The General Allotment Act (24 Stat. 388) and of acts amendatory thereof, and of the Act of March 3, 1909 (35 Stat. 781, 783)."

governments, and the need for tribal economic development leading toward self-sufficiency. In the Indian Financing Act of 1974, P.L. 93-262, 88 Stat. 77, 25 U.S.C. § 1451, *et seq.*, Congress declared it to be federal policy "to help develop Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." Similarly, in the Indian Self Determination and Education Assistance Act of 1975, P.L. 93-638, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*, Congress declared its "commitment . . . to a meaningful Indian self determination policy" and to "effective and meaningful participation by the Indian people in the planning, conduct and administration" of federal Indian programs. 25 U.S.C. § 450a (b).[6]

It is self evident that in order to implement the federal goal of self determination, tribes must have the capacity to develop and utilize their limited resources to the maximum possible extent. State restriction of the income from those resources, as by state taxation of their development, directly impairs the ability of tribal governments to function.

Second, encouraged by this Court's recognition of the tribal right to tax, *e.g.*, *Merrion v. Jicarilla Tribe*, 455 U.S. 130 (1982), tribal governments today, unlike in 1949, are increasingly imposing *tribal* taxes on the development of reservation minerals. *See, e.g.*, Exhibit 2. Such tribal taxes play an increasingly important role in the development of tribal economies. State taxation simultaneously imposed on reservation minerals limits or impairs the flow of tax revenues to the tribes.

[6] *See also* the Indian Tribal Governmental Tax Status Act, P.L. 98-369, 98 Stat. 1048, 26 U.S.C. § 7871, granting to Indian tribes bonding authority and certain immunities from federal taxation.

Third, in the Indian Mineral Development Act of 1982, P.L. 97-382, 96 Stat. 1938, 25 U.S.C. § 2101 *et seq.*, Congress recently recognized new flexibility in lease terms and a new role for tribal governments in trying to secure maximum returns on their mineral estates. The Act facilitates negotiated mineral contracts between tribes and producers. Imposition of a state tax interferes with the tribe's ability, encouraged by Congress, to strike the deal most favorable to it.

Additionally, as we show in Part III, *Oklahoma Tax Commission* is inconsistent with the subsequent development and application of the Court's pre-emption test in *Bracker*, *Ramah*, and *Cabazon*.

For all these reasons, the *Oklahoma Tax Commission* case is of doubtful continuing validity and should be overruled or limited to its facts. The issue of state taxation on oil production should be analyzed by the same standards as state taxation or regulation of other reservation activities. Under these principles, where the activity at issue is heavily regulated by the federal government, where the Tribe itself taxes the production, and where the value is created on the reservation, the state should be precluded from taxation unless it can show a delegation of authority by Congress, or an overriding state interest. In taxation of oil production on Indian reservations, there is no such overriding state interest nor any such authority from Congress.

III. STATE TAXATION OF TRIBAL MINERAL DEVELOPMENT IS PRE-EMPTED BY FEDERAL LAW AND POLICY.

The general test developed by the Court in *Bracker* and its progeny to determine when state laws are preempted from application to on-reservation activities clearly applies here and mandates reversal of the judgment below. As noted above, that test provides that state taxation is pre-empted if it "interferes or is incompatible with federal and tribal interests" at issue, unless the countervailing state interest is sufficient to outweigh federal and tribal interests. *Cabazon*, 94 L. Ed. 2d at 259.

In light of the cases where this Court has previously found state taxes to be pre-empted, a state severance tax on the extraction of minerals from trust land is necessarily also pre-empted. In *Bracker*, for instance, the Court held that Arizona's motor carrier license tax and its fuel use tax were both pre-empted from application to a non-Indian logging company doing business on the reservation. The Court found that the Federal government's regulation of the harvesting of tribal timber is "comprehensive. That regulation takes the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs." 448 U.S. at 145.

Similarly, in *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982), the Court held that New Mexico was pre-empted from imposing its gross receipts tax on a non-Indian construction company building a school on a reservation. As in *Bracker*, the Court found that federal regulation of Indian educational institutions "is both comprehensive and pervasive." 458 U.S. at 839. The Court took note of the "detailed regulatory scheme governing the construction of autonomous Indian educational facilities," *id.* at 841, and held that such comprehensive federal supervision "leave[s] no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts" on the non-Indian contractor. *Id.* at 842.

The federal regulation of Indian mineral production at issue in this case is every bit as comprehensive and detailed as the federal regulation of Indian logging in *Bracker* and of Indian education in *Ramah*. If the regulatory schemes of *Bracker* and *Ramah* provide a federal bulwark against state taxation of non-Indians doing busi-

ness on the reservation, then *a fortiori* such taxation cannot be imposed on the non-Indian companies which develop a tribe's on-reservation mineral resources.[7]

Federal policy in this area is expressed in the Minerals Leasing Act of 1938, 25 U.S.C. 1451 §§ 396a-396g, as expanded by the Indian Mineral Development Act of 1982, *supra*. The 1938 Act was designed to achieve three goals: first, uniformity in the laws governing mineral leasing on Indian lands; second, the revitalization of tribal governments, as provided for in the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, by giving those governments control over decisions to lease their lands, subject to approval by the Secretary of the Interior; and third, the encouragement of tribal economic development. *See* H.R. No. Rep. 1872, 75th Cong., 3d Sess. at 1-3 (1938); S. Rep. No. 985, 75th Cong., 1st Sess. 2-3 (1937); *see generally Montana v. Blackfeet*, 471 U.S. 759 (1985); *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104, 1112 (9th Cir. 1981).

The Act establishes a detailed regulatory structure over Indian minerals leasing. It provides that an Indian tribe may lease its lands for mining purposes with the approval of the Secretary of the Interior. 25 U.S.C. § 396a. Section 396b provides for sale of oil and gas mining leases under regulations to be promulgated by the Secretary. The other provisions of the Act require

[7] Indeed, this Court has already addressed—and rejected—the permissibility of a state severance tax on tribal mineral production. In *Crow Tribe of Indians v. State of Montana*, 484 U.S. ——, 98 L. Ed. 2d 638 (1988), *sum. aff'g* 819 F.2d 895 (9th Cir. 1987), this Court summarily affirmed the Ninth Circuit's ruling that federal law and policy pre-empt the imposition of a state severance tax on a non-Indian lessee's production of a tribe's mineral resources. The issue of law in the *Crow Tribe* case is virtually identical to the pre-emption question here. The Court's summary affirmance of the Ninth Circuit decision is, of course, a ruling on the merits and establishes precedent for the Court. *Mandel v. Bradley*, 432 U.S. 173 (1977); *Hicks v. Miranda*, 422 U.S. 332 (1975); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959).

lessees to post surety bonds for their operations, 25 U.S.C. § 396c, and direct the Secretary to promulgate rules and regulations to govern "[a]ll operations under any oil, gas or other mineral lease issued pursuant" to the Act. 25 U.S.C. § 396d.

The regulations issued by the Secretary are broad in scope and detailed in nature. Proposed tribal leases must be offered at an advertised sale pursuant to specified procedures governing notice, advertising and bidding. 25 C.F.R. § 211.3. The Secretary has the right to reject all bids when "in his judgment the interests of the Indians will be best served by so doing . . ." 25 C.F.R. § 211.3(b). The regulations provide that corporate bidders must submit detailed information concerning their officers, directors, shareholders and finances. 25 C.F.R. § 211.5.

The regulations specify the terms of tribal mineral leases as well. The area covered by a lease "shall be a reasonably compact body," 25 C.F.R. § 211.8, and in no event can exceed 2,560 acres. 25 C.F.R. § 211.9(a). The primary term of a lease may not exceed ten years, 25 C.F.R. § 211.10, with the secondary term to be for so long as the minerals are produced in paying quantities. *Id.*

Rents and royalties are also closely regulated. The minimum rental and royalty rates are set by regulation. 25 C.F.R. § 211.13(a). "Value" of production, for purposes of calculating royalty payments, is defined by alternate standards. *Id.* The timing and manner of making royalty payments to tribes is also specified. 25 C.F.R. §§ 211.12, 211.16.

The Secretary's regulations also provide for inspection of the lessee's operations and records by the tribal lessor or by the Secretary, 25 C.F.R. § 211.18, and penalties for failure to comply with the terms of leases, 25 C.F.R. § 211.22, including the cancellation of leases when deemed justified by the Secretary. 25 C.F.R. § 211.27.

A number of federal agencies—the Bureau of Indian Affairs, the Bureau of Land Management, the United States Geological Service and the Minerals Management Service—all play important roles in the federal administration and regulation of tribal mineral development. The federal role runs the regulatory gamut from the advertising and acquisition of leases to the spacing, drilling, inspection and plugging of wells, the payment, accounting and auditing of royalties, the filing with federal agencies of extensive reports on production and well activity, and environmental and archeological protection of tribal lands. *See* 43 C.F.R. §§ 3100, 3160.01-3186.4; 30 C.F.R. §§ 202, 203, 206, 207, 210 and 241.

This regulatory scheme for mineral development on tribal land is every bit as "comprehensive and pervasive," *Ramah, supra* at 839, as the regulatory schemes at issue in *Ramah* and *Bracker.* The Secretary "exercises literally daily supervision," *Bracker, supra* at 147, over the development of tribal minerals. And as in those prior cases, "the federal regulatory scheme is so pervasive as to preclude the additional burdens" imposed by the state scheme of taxation. *Id.* at 148.

In *Bracker,* the Court identified three ways in which imposing state taxes on the non-Indian contractor would interfere with the federal regulatory policy. First, the Court held that the taxes "would threaten the overriding federal objective of guaranteeing Indians that they will receive" the benefits of the profits that their resources are capable of yielding. 448 U.S. at 149. Second, the taxes would undermine the Secretary's ability to "make the wide range of determinations committed to his authority concerning the setting of fees and rates," *id.*, by introducing extraneous factors concerning state taxes into the Secretary's calculations. Finally, the state taxes would interfere with tribal resource management programs by diminishing the amount of tribal funds available for those efforts. *Id.* at 149-150.

Precisely the same adverse consequences result from the New Mexico severance taxes imposed in this case, or from the severance taxes imposed on tribal mineral development by any other state. The overriding federal purpose for tribal development of mineral resources is to assure that the "Indians receive 'the greatest return from their property.'" *Montana v. Blackfeet Tribe of Indians,* 471 U.S. at 767 n.5 *quoting* S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937) and H.R. Rep. No. 1872, 75th Cong., 3d Sess. 2 (1938). This, as the Court noted in *Bracker,* "is part of the general federal policy of encouraging tribes 'to revitalize their self government and to assume control over their business and economic affairs.'" 448 U.S. at 149 *quoting Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 151 (1973).

Given an organized tribal government which either imposes a tribal tax or has an expressed policy against taxation, and given free bargaining for a lease's bonus or royalty rates, the imposition of a state severance tax on the extraction of tribal minerals necessarily reduces the income the tribal lessor or taxing authority can receive. As the Ninth Circuit said of an analogous situation in *Crow Tribe,* "The state taxes increase the costs of production by the coal producers, reducing in turn the royalty that can be paid to the Tribe." *Crow Tribe,* 819 F.2d at 899. Even though the state taxes at issue in *Crow Tribe* were more onerous than the New Mexico taxes at issue here, the same economic effect, even if to a lesser degree, will still be felt by the tribe. Inevitably, the imposition of a tax on the non-Indian lessee will directly or indirectly work a diminution of revenues flowing to the tribal lessor. This directly conflicts with a principal purpose of the 1938 Mineral Leasing Act: "to ensure that Indians receive 'the greatest return from their property.'" *Montana v. Blackfeet Tribe of Indians,* 471 U.S. at 767 n.5.

And it is precisely this adverse effect on tribal revenues which impermissibly burdens the federal policy to maximize tribal economic self sufficiency. The imposition of the state taxes "would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details of" minerals production "and expressed a firm desire that the Tribe should retain the benefits derived from" the production of reservation minerals. *Bracker, supra* at 149.

Further, as in *Bracker,* the Secretary's statutory obligation to review, supervise and approve the rates and royalties for tribal minerals is undermined by the complication of extraneous state taxes. "The assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors." *Bracker, supra* at 149.

These burdens on tribal revenues are particularly severe in the case of a depletable tribal resource such as oil, gas, coal or other minerals. Whereas in *Bracker* the Court noted that federal policy encouraged conservation of the timber resources at issue there in order "to ensure the continued productivity of the forest," 448 U.S. at 150, no such sustained yield is possible in mineral development. Once the resource is mined from the reservation, it is gone forever. The mineral itself represents a principal component of the value of the land. In this light, it is vitally important that the economic value of the tribe's mineral resource not be impaired by state taxation. Indeed, tribal minerals are such an inherent and irreplaceable part of tribal property that state taxation of the minerals is tantamount to a taxation of the tribal land itself, a tax which would unquestionably be impermissible. *E.g., The Kansas Indians,* 72 U.S. (5 Wall.) 737 (1867); *The New York Indians,* 72 U.S. (5 Wall.)

761 (1867). And as this Court has noted, a severance tax on minerals, like New Mexico's, "in many respects . . . is like a real property tax." *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 624 (1981).[8]

Although greatly impairing federal and tribal interests here, the state severance tax furthers no defined state interest that could serve to outweigh its adverse consequences. This Court has repeatedly rejected the notion that a state tax on tribal activities can be justified by "a general desire to raise revenue." *Bracker, supra* at 150; *see also New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 336 (1983); *Ramah Navajo, supra* at 839. And state taxes on reservation activities carry a special burden that is rarely surmounted. As the Court noted in *Cabazon,* "in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands. . . ." 94 L. Ed. 2d at 258 n.17 *quoting Mescalero Apache, supra* at 148. Nor must each fact situation be individually litigated. "We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case." *Cabazon, supra* at 258 n.17.[9]

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[8] This Court has previously noted the close tie between the natural resources on tribal land, and the land itself. In *Squire v. Capoeman,* 351 U.S. 1 (1956), the Court held that income to an allottee from sale of timber on alloted land was not subject to federal income taxation. The "timber constitutes the major value of his allotted land" and "[o]nce logged off, the land is of little value." 351 U.S. at 10. So, too, once a tribe's oil is pumped, or its coal is mined, a major portion of the value of the land is forever lost. Taxing a portion of that mineral resource works a direct diminution of the value of tribal land.

[9] We take no position on whether, if the Court finds the New Mexico taxes to be pre-empted, it should do so prospectively only. *See, e.g., Tyler Pipe Industries v. Washington State Department of*

In sum, the state severance tax imposed by New Mexico here not only is tantamount to a state tax on tribal real property, but it also works directly at cross purposes with the 1938 Minerals Leasing Act and the federal policy there expressed, as expanded in subsequent Acts of Congress, to encourage and support—but regulate—the development of tribal mineral resources, and to maximize the economic return to the tribe from such depletable resources. The state tax furthermore interferes with the intricate web of federal controls imposed on tribal mineral development. In *Bracker*, and in *Ramah Navajo*, the state tax imposed on the non-Indian contractor was in each case deemed pre-empted by the federal law and policy supporting tribal interests. Nothing materially distinguishes the Court's analysis in those cases from the case here. Accordingly, federal law and policy pre-empt New Mexico from imposing its severance tax on the development of reservation mineral resources.

Revenue, 483 U.S. ——, 97 L. Ed. 2d 199, 216 (1987) *on remand* 109 Wash. 2d 878, 749 P.2d 1286 (no retroactivity), *cert. den. and app. dismd.*, —— U.S. ——, 56 U.S.L.W. 3831 (June 6, 1988); *Williams v. Vermont*, 472 U.S. 14 (1985). *Cf. Florida v. Hughlan Long*, —— U.S. ——, 56 U.S.L.W. 4718 (June 22, 1988) (rejecting retroactive award of pension benefits in Title VII claim); *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) (same).

CONCLUSION

The judgment of the court below should be reversed, and the state taxes should be held pre-empted.

Respectfully submitted,

HARRY R. SACHSE *
DONALD J. SIMON
SONOSKY, CHAMBERS & SACHSE
1250 Eye Street, N.W.
Washington, D.C. 20005
(202) 682-0240
Counsel for Assiniboine and Sioux Tribes of the Fort Peck Reservation

June 30, 1988

* Counsel of Record

EXHIBITS

EXHIBIT 1

Montana Oil and Gas Fields Symposium 1985

SUMMARY OF MONTANA STATE OIL AND GAS PRODUCTION TAXES

By John W. Ross [1]

I. INTRODUCTION

This is intended to inform persons and oil companies considering exploration and development of oil and gas in Montana about several positive recent changes in Montana's taxes on oil and gas production. The 1985 Montana Legislature made significant amendments with regard to oil and gas taxes effective July 1, 1985. As a result, Montana's oil and gas taxes, particularly on "new production", are less, and more predictable than taxes prior to the changes by the 1985 Legislature. The term "new production" means crude or natural gas produced from any lease that has not produced during the five years immediately preceding July 1, 1985.

The summary first presents Tables which show (1) Montana's taxes on "new" oil production, (2) Montana's taxes on oil produced by tertiary recovery, (3) Montana's taxes on "new" gas and (4) Montana's oil taxes prior to changes by 1985 Montana Legislature. Second, this summary presents a brief discussion of each oil and gas tax—including the statutory basis for the tax, filing requirements, and how the taxes are calculated.

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[1] Attorney
Anderson, Brown, Gerbase, Cebull & Jones, P.C.
Billings, Montana
NOTE: Some of the data used in this article was provided by C. W. Summers, Manager Western Tax Region, Shell Oil Company, Anaheim, California.

TABLE 1

TOTAL MONTANA OIL TAXES ON "NEW PRODUCTION" AFTER CHANGE BY 1985 LEGISLATURE:

5%	(.05)	oil severance tax
7%	(.07)	oil net proceeds tax
.5%	(.005)	resource indemnity trust tax
.8%	(.0008)	Oil and Gas Board license tax
12.58	(.1258)	Total Montana taxes on "new production" of oil, after changes by 1985 Legislature. Therefore if one produces a barrel of "new" oil which is assumed to have a value of $30.00, one would pay a total of $3.77 in Montana oil taxes.

TABLE 2

MONTANA OIL TAXES ON OIL PRODUCED BY TERTIARY RECOVERY

2.5%	(.025)	Severance tax produced by tertiary recovery
5%	(.05)	Oil net proceeds tax
.5%	(.005)	resource indemnity trust tax
.08%	(.0008)	Oil and Gas Board license tax
10.08%	(.1008)	Total Montana taxes on oil produced by tertiary recovery

TABLE 3

TOTAL MONTANA GAS TAXES ON "NEW PRODUCTION" AFTER CHANGES BY 1985 MONTANA LEGISLATURE

2.65%	(.0265)	gas severance tax
12%	(.12)	net proceeds tax
.5%	(.005)	resource indemnity trust tax
.08%	(.0008)	Oil and Gas Board license tax
15.23%	(.1523)	Total Montana taxes on gas production

TABLE 4

TOTAL MONTANA GAS TAXES PRIOR TO CHANGES BY THE 1985 LEGISLATURE

6%	(.06)	oil severance tax
12%	(.12)	approximate average of Montana's net proceeds taxes (Note: the actual rate of the net proceeds taxes prior to changes by 1985 Legislature relating to "new production" vary, and will continue to vary on "old" production from County to County depending on local mill levies
.5%	(.005)	resource indemnity trust tax
.05%	(.0008)	Oil and Gas Board license tax
18.58%	(.1858)	Total Montana taxes on oil, prior to changes by 1985 Legislature

II. DISCUSSION OF MONTANA'S OIL AND GAS TAX

A. SEVERANCE TAXES:

Montana has a severance tax on oil, which was reduced by the Montana Legislature from six percent (6%) to five percent (5%). The Montana Legislature also reduced the oil severance tax on oil produced by Tertiary Recovery to 2.5%. Montana has a severance tax on natural gas, which is applied at a rate of 2.65%.

There follows a brief discussion of Montana's oil severance tax and Montana's natural gas severance tax.

1. OIL SEVERANCE TAX:

Montana's severance taxes on oil are set forth in Title 15, Chapter 36, MCA. Montana's severance tax on oil is applied to the total gross value of production, less any oil used in connection with the operation of the well. Government interests are exempt. The gross value of products

taxable include crude oil, condensate, distillate, and all other crude petroleum products.

A tax return and payment of the oil severance tax is due and must be filed with the Montana Department of Revenue sixty days (60) after the end of each calendar quarter.

2. NATURAL GAS SEVERANCE TAX:

Montana's severance tax on natural gas is set forth in Title 15, Chapter 36, MCA. The severance tax on natural gas is applied to the total gross value of the natural gas produced from each lease or unit. The gross value of products taxable include residue and natural gas liquids, including ethane, butane, propane, natural gasoline, etc., less amounts used in the operation of well. No deductions are allowed for processing costs. Governmental interests are exempt. Natural gas produced from a well five thousand (5,000) feet or deeper is exempt from tax for three years, if the well meets certain requirements set forth in Section 15-31-121 MCA.

A tax return and payment of the natural gas severance is due and must be made to the Montana Department of Revenue sixty days after the end of each calendar quarter. The producer is required to pay the tax in full for its own account and for the account of each owner.

Montana also has a resource and indemnity trust tax, which is designed to compensate future damages from all types of mineral extraction in Montana. The resource and indemnity tax is applied at a rate of .5% (.005), with a $25.00 minimum. The resource and indemnity trust tax is applied to the gross value of all oil and gas, and other merchantable minerals, produced or extracted from the surface or sub-surface. No deductions are provided.

The tax return is due and must be made to the Montana Department of Revenue sixty (60) days after the end of each calendar quarter. Payment of the resource and

indemnity tax is made annually with the fourth quarter tax return to the Montana Department of Revenue.

B. NET PROCEEDS TAXES:

Montana has a so-called "net proceeds tax" on oil and gas production. Prior to action by the 1985 Montana Legislature, the net proceeds tax on oil and gas production varied greatly in different parts of the State of Montana, and even in areas of one county, depending upon local school levies and other needs in particular areas. Prior to action by the 1985 Montana Legislature, this "net proceeds tax" on oil and gas production could range anywhere from approximately one-half percent (½%) to twenty percent (20%). Senate Bill 390, passed by the 1985 Montana Legislature, provides for a uniform net proceeds rate of taxation on "new production". The term "new production", means crude or natural gas produced from any lease that has not produced during the five years immediately preceding July 1, 1985. After July 1, 1985, a seven percent (7%) net proceeds tax will be applied to "new production" of oil, and a twelve percent (12%) net proceeds tax will be applied to the production of "new" gas.

The net proceeds tax on "old" oil and gas will continue to be applied at a varying rate, depending upon local mill levies.

The net proceeds tax is applied to the gross sales value, less an amount for windfall profit taxes, royalties and certain extraction costs. There has been some dispute concerning the allowable deductions. A lawsuit was filed in October, 1984, challenging certain assessments and deductions in the calculation of Montana's net proceeds tax on oil and gas production.

The gross value for purposes of the net proceeds tax is determined by the Montana Department of Revenue and provided to various county treasurers. The taxes are collected by the various counties.

C. PROPERTY TAXES:

Montana has property taxes which are set forth in Title 15, Chapter 6, MCA. Montana's property taxes apply to oil and gas field machinery, equipment and supplies. Senate Bill 67, passed by the 1985 Montana Legislature exempts certain "down hole" equipment in oil and gas wells from properties subject to taxation.

Oil and gas property taxes are applied at rates of eleven percent (11%) to sixteen percent (16%) of the market value, with local mill levies applied to such value. Market value is arrived at by trending and depreciating original costs, using tables provided annually by the Montana Department of Revenue.

D. OIL AND GAS CONSERVATION LICENSE TAX:

Montana has a license tax, which is intended to help fund regulation by the Montana Board of Oil and Gas Conservation. The Montana Board of Oil and Gas Conservation license tax is applied to the gross value of all oil and gas produced, less government royalties. The rate of the tax is .08% (.0008). A tax return and payment of this license tax is due and must be made to the Montana Department of Revenue sixty (60) days after the end of each calendar quarter.

E. INCOME TAX:

Montana has a corporate income tax, which is set forth in Title 15, Chapter 31, MCA.

III. MISCELLANEOUS MATTERS

The 1985 Montana Legislature provided for a reduction in certain Montana oil and and gas taxes.

Senate Bill 443, which would have delayed the one (1%) percent reduction, from six percent (6%) to five percent (5%) in oil severance taxes until 1987, was defeated. Thus the scheduled reduction in the oil severance

tax from six percent (6%) to five percent (5%) was made effective April 1, 1985.

There were several other favorable changes. House Bill 636 provided for a reduction in the severance tax on petroleum produced by tertiary recovery methods to two and one-half (2½%). Senate Bill 462 revised certain allowable deduction in determining net value for the net proceeds tax.

It should be noted that there is some question whether the State of Montana can tax the production of oil and gas produced on Indian Reservations. In 1978 the Blackfeet Tribe of Montana, filed an action in Federal District Court seeking to enjoin Montana's taxation of Tribal royalties from oil and gas produced on the Blackfeet Reservation. A Montana Federal District Court initially entered summary judgment for the State of Montana, holding that 25 USC § 397 expressly authorized state taxation of production of oil and gas on Indian lands. However, the Ninth Circuit reversed the Montana District Court and the United States Supreme Court has accepted certiorari, and a decision is pending.

In many states, all oil drilling and pumping equipment purchased or brought into the state is subject to a sales or use tax. In Wyoming, the sales tax is 3% (4% in some cities); in North Dakota, 3%; in Texas, 4%; and in California, 6%. Montana has no sales tax. Since sales taxes must be paid before production begins this cost may deter exploration. Montana's severance taxes and net proceeds tax are not due until *after* production has begun.

Like North Dakota, Oregon, California, and several other states, Montana allows oil producers to deduct the windfall profit tax paid during the year when computing the state corporation tax due. Some states do not allow this deduction.

EXHIBIT 2

TITLE XVII—TAXATION

Chapter 1. Oil and Gas Tax

Sec. 101. *Tax.*

Any person or entity engaged in the production of oil or gas, or oil and gas, from land located within the exterior bounds of the Fort Peck Indian Reservation and held in trust by the United States (hereafter "trust oil or gas") for the Tribes, or for an individual Indian, shall, for the privilege of doing business on the Reservation pay *seven* percentum of the market value at the well of all trust oil and gas produced, saved and sold or transported from the field where produced.

Sec. 102. *Exclusions and credits.*

(a) Exclusions. The tax imposed by this Chapter shall not apply to:

> *(1) The interest of the Tribes in such trust oil gas;*
>
> *(2) The royalty or other interest in such trust oil or gas of the United States or any Indian for whom the land from which it was produced is held in trust.*

(b) Credits. If the rate of royalty payable to the Tribes, the United States, or any Indian beneficiary of trust land together with this tax exceeds 27 percent of total production, then any portion of this tax above such 27 percent shall be credited against payment of the tax so that the total of this tax and royalty shall not exceed 27percent.

Sec. 103. *Payment.*

The tax shall be paid on a quarterly basis by check made payable to the Assiniboine and Sioux Tribes and delivered to the Tribal Oil and Gas Office at Poplar, Montana on or before February 15, May 15, August 15 and November 15 of each year.

*　*　*　*

AMICUS CURIAE

BRIEF

No. 87 - 1327

IN THE

Supreme Court of the United States

October Term, 1987

COTTON PETROLEUM CORPORATION, et al.,

Appellants,

STATE OF NEW MEXICO, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

***AMICUS CURIAE* BRIEF OF NEW MEXICO OIL & GAS ASSOCIATION**

SARAH M. SINGLETON
Counsel of Record

EDMUND H. KENDRICK
GALEN M. BULLER
Of Counsel

MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504
(505) 982-3873

Counsel for Amicus Curiae
New Mexico Oil & Gas Association

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***AMICUS CURIAE* BRIEF OF NEW MEXICO OIL & GAS ASSOCIATION**

INTEREST OF *AMICUS CURIAE*

The New Mexico Oil & Gas Association respectfully submits this brief as *amicus curiae* in support of the position of Appellants in this case. Both Appellants and Appellees have consented to the filing of this brief. These written consents have been filed with the Clerk of this Court.

The New Mexico Oil & Gas Association is a nonprofit association representing about two hundred and fifty member companies and individuals in all facets of the oil and gas industry in New Mexico. Many members are engaged in oil and gas production on Indian reservations in New Mexico. The Asso-

ciation is concerned that overlapping New Mexico and Indian tribal taxes are causing adverse economic impacts on the oil and gas industry in New Mexico. The Association believes that Constitutional restraints on such multiple taxation should be recognized.

SUMMARY OF ARGUMENT

This Court has invited the parties to brief and argue the following question:

> Does the Commerce Clause require that an Indian Tribe be treated as a state for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe?

Amicus curiae believes that this question must be answered in the affirmative. Both the scope of the Interstate Commerce Clause and the nature of Indian tribes compel this conclusion. There is no indication in either the Interstate Commerce Clause itself or in congressional enactments that Indian tribes are allowed to burden the free flow of interstate commerce in a way proscribed to the states. As subordinate governments in the federal system, Indian tribes are not insulated from the negative implications of the Interstate Commerce Clause. Because a tribe's taxation powers are comparable to those of a state, the potential burdens of such taxation on interstate commerce are equally profound. Consequently, this Court should protect interstate commerce by requiring apportionment of overlapping state and Indian tribal taxes.

ARGUMENT

I. Like A State, An Indian Tribe Is Subject To The National Government's Interest In Maintaining The Free Flow Of Commerce Within The Nation's Borders.

A state tax on an activity in commerce among the states must be fairly apportioned in order to be sustained against Interstate Commerce Clause[1] challenge. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Apportionment, by definition, entails the division or distribution of taxing authority over two or more jurisdictions. Taxes are apportioned among taxing jurisdictions so that no instrumentality of interstate commerce is subjected to more than one tax on its full value. Necessarily, no jurisdiction may tax the instrumentality in full. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979).

While no doubt lingers about the Constitutional requirement that taxes imposed by sister states must be apportioned, the question posed by this Court addresses the unresolved issue of whether the commerce clause requires an Indian tribe to be treated as a state for tax apportionment purposes. This question necessarily implicates the status of an Indian tribe under the Interstate Commerce Clause. Although there has been no recent judicial determination of this issue,[2] the purpose of the

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1 Throughout this brief the clause addressing "commerce . . . among the several states" is referred to as the "Interstate Commerce Clause" or "Clause" and is found at U.S. Const. art. I, §8, cl. 3.

2 The Court of Appeals for the Eighth Circuit has stated that an Indian tribe may not restrain interstate commerce. *Muskogee Nat'l Telephone Co. v. Hall*, 118 F.382, 385 (8th Cir.1902) (recognizing that "what a state

Interstate Commerce Clause and the nature of Indian tribes compel the conclusion that Indian tribes are subject to the restraints of that Clause.

The language of the Interstate Commerce Clause, granting Congress power to regulate commerce "among the several states" is absolute on its face and expresses no limitations. The scope of the Clause is expansive with a purpose variously described as "to create an area of free trade among the several States." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944); to have a "national 'common market,' " *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977); "to avoid tendencies toward economic Balkanization," *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979); to centralize regulation of commerce among the states at the federal level. *H.P. Hood & Sons v. DuMond*, 336 U.S. 525, 533, 534 (1949); and "to ensure a national economy free from . . . unjustifiable local entanglements," *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 760 (1967).

It is the "Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from *any source* . . . ." *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 166 (1954). (Emphasis added). An Indian tribe should be recognized as one of the sources proscribed from creating such an obstruction. Just as federal statutes of general applicability govern Indians as well as non-Indians, *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), so should a United States Constitutional provision of general applicability apply to Indian governments as well as other subordinate governments within the Nation's borders.

cannot do, because it operates as an obstruction to the free flow of interstate commerce, the Creek Nation (which is said to embrace as much territory as some of the states) cannot do.")

The phrase "among the states" in the commerce clause describes the type of commerce subject to regulation by Congress rather than the jurisdictions subject to such regulation. Although historically most attacks under the Interstate Commerce Clause have been launched against states, other governmental entities also have been subject to scrutiny. Political subdivisions of a state are restrained from hindering the flow of interstate commerce. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951). The District of Columbia, although not a state or a subdivision of a state, is subject to that Clause's prohibitions. *See, e.g., Electrolert Corp. v. Barry*, 737 F.2d 110 (D.C. Cir. 1984).

Similarly, the Virgin Islands, as an unincorporated territory, is subject to the Interstate Commerce Clause, absent an express statement to the contrary from Congress. *JDS Realty Corp. v. Government of V.I.*, 824 F.2d 256, 260 (3rd Cir.1987), *vacated and remanded to consider mootness*, 108 S. Ct. 687 (1988). The circuit court determined that the Constitution's affirmative grant of power to Congress to regulate interstate commerce applies to territories despite the fact that Congress has comprehensive power to regulate territories under the territorial clause, art. IV, §3, cl. 2. Although the opinions of the lower courts are not uniform on this issue, *see Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986), the better reasoned position, voiced by the Third Circuit, demonstrates that the application of the Interstate Commerce Clause should extend with equal force to territories as to states. *See, e.g., Sea-Land Services, Inc. v. Municipality of San Juan*, 505 F. Supp. 533, 545 (D.P.R. 1980), where a Puerto Rican municipal license tax was held to violate the Interstate Commerce Clause because it was not fairly apportioned.

Indian tribes should be subject to the Interstate Commerce Clause, as are political subdivisions of a state, the District of

Columbia and territories.[3] The reasons that have persuaded courts that territories should be subject to that Clause are particularly germane. It is immaterial that Congress derives its power over Indian tribes from a Constitutional source independent of the Interstate Commerce Clause. Congress also derives its power over territories from an independent Constitutional source. The separate source of congressional power should in no way limit the affirmative grant of power to Congress under the Interstate Commerce Clause or the negative implications of that Clause, which restrain subordinate governments in the absence of congressional action.

That an Indian tribe should be subject to the Interstate Commerce Clause is consistent with other limitations on tribal sovereignty.

> This Court has found such a divestiture [of tribal powers] in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protection of the Bill of Rights.

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153-54 (1980). Because Indian tribes

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[3] The power of Congress over Indians is "similar to the power Congress exercises over the District of Columbia, territories and possessions, and other federal enclaves." *Irving v. Clark*, 758 F. 2d 1260, 1263 n.4 (8th Cir. 1985), *aff'd sub nom., Hodel v. Irving*, 107 S. Ct. 2076 (1987), *citing* F. Cohen, *Handbook of Federal Indian Law* 219-20 (1982). Indian tribes have been compared to domestic territories for purposes of giving judgments of tribal courts full faith and credit. *See, e.g., United States v. Coxe*, 59 U.S. (17 How.) 100 (1855).

are under the territorial sovereignty of the United States, "their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978).

The ability of an Indian tribe to burden interstate commerce without express approval by Congress would be inconsistent with its dependent status.

> [The] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.

Montana v. United States, 450 U.S. 544, 564 (1981). Although the power to tax non-Indians is within a tribe's sovereign power, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), to do so in a way that burdens interstate commerce would be inconsistent with a tribe's dependent status. As this Court has noted, "the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *United States v. Wheeler*, 435 U.S. 313, 326 (1978). Burdening interstate commerce in a way proscribed to states would be a determination of external relations inconsistent with a tribe's dependent status.

If Congress chooses to allow tribal taxation to burden interstate commerce, its intent to do so, as in the case of states, should be clearly expressed. State legislation is insulated from the Interstate Commerce Clause only if congressional intent to do so is "expressly stated" and "unmistakably clear." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 90, 91 (1984). *Timber Development* rejected the notion that Congress

can implicitly approve a state regulation that would violate the dormant commerce clause. The rationale was to prevent economic Balkanization and protect unrepresented interests.

> Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." . . . On the other hand, when Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

467 U.S. at 92. (Citations and footnote omitted.) The risks of economic Balkanization and adverse impacts on unrepresented interests are as great when interstate commerce is restrained by an Indian tribe as when it is restrained by a state. Consequently, if Congress is to allow an Indian tribe to restrain interstate commerce, such an allowance should be expressly stated.

Congress has never indicated, expressly or by implication, that tribal taxes may restrain interstate commerce. *Amicus* is unaware that Congress has addressed the issue of tribal taxation other than in the Natural Gas Policy Act of 1978 §§ 110(a), (c)(1) 15 U.S.C.A. §§ 3320(a), (c)(1) (1982). There Congress

has included severance taxes imposed by Indian tribes in its definition of state severance taxes that may be recovered under federal energy pricing regulations. Just as the provision in the Federal Power Act §201(b), 16 U.S.C.A. §824(b) (1985), recognizing that states have certain authority over the exportation of hydroelectric energy across a state line, does not alter the limits of state power otherwise imposed by the commerce clause, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982), congressional recognition of the existence of tribal and state severance taxes is not express permission to burden interstate commerce.

Given the pervasive power of Congress to regulate commerce among the states, the policies restraining states from burdening interstate commerce apply with equal force to Indian tribes. Because Congress has not explicitly addressed the limits of tribal taxation power, it is the responsibility of the judiciary to protect interstate commerce from interference by the tribes. This Court can protect interstate commerce from such interference by determining that tribal taxes, like state taxes, are subject to the Interstate Commerce Clause.

II. Like Taxation Of Interstate Commerce By More Than One State, Overlapping State And Tribal Taxation Should Be Apportioned.

In the exercise of overlapping taxation authority, a state and a tribe generally function in a manner equivalent to sister states. If there is no federal legislation allowing either an Indian tax or a state tax to preempt the other, and if the state tax does not infringe upon tribal sovereignty, *Williams v. Lee*, 358 U.S. 217 (1959), the two taxes are parallel rather than hierarchical. Like two sister states, neither a state nor a tribe can control

the taxation of the other.[4]

Because a tribe functions in a manner similar to a state in the area of taxation, the need for apportionment of overlapping state and tribal taxation is just as great as in the area of multiple state taxation. As this Court has repeatedly recognized, a primary purpose of apportionment is to ensure that interstate commerce pays an appropriate share of the costs of local government. *See Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. at 166 (acknowledging that a state has a "rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received"); *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 748 (1978) (relating apportionment to a state's interest in "exacting from interstate commerce its fair share of the cost of state government"); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 462 (1959) (stating that "[l]ogically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice"). If two jurisdictions levy taxes without apportionment on the same activity in interstate commerce, one or both of those jurisdictions has exacted more than its fair share of revenue from that commerce.

The need for apportionment of the state and tribal taxes is obvious in the present case. The Appellants, as well as the

4 A state and its subdivisions are permitted to tax the same property in the same year. *Veterans' Foreign Wars, Ledbetter-McReynolds Post No. 3015 v. Hull*, 51 N.M. 478, 188 P.2d 334 (1947). Taxation by a subdivision of a state is typically by delegation of a state's authority. It is apparent that taxation of interstate commerce by more than one entity within a state would not in itself implicate the apportionment requirement. Unlike multiple taxation by a tribe and a state, such taxation within a state really represents only taxation by one sovereign, the state.

members of *amicus*, pay two sets of oil and gas production taxes, one to the State of New Mexico and one to the Jicarilla Apache Tribe, for the same activity in interstate commerce. Each set of taxes is imposed as though the other does not exist. In return for this double taxation, Appellants, as well as members of *amicus*, receive one set of services provided in some proportion by the two taxing authorities.

The New Mexico taxes challenged in the present case should be apportioned to reflect Jicarilla taxes on the same activities. Such a determination recognizes that both Indian tribes and states are subject to the comprehensive power of Congress to regulate interstate commerce and that this Court should protect such commerce by requiring apportionment of multiple taxation.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals of New Mexico and should answer this Court's question to the parties with an affirmative determination that "the Commerce Clause require[s] that an Indian Tribe be treated as a state for purposes of determining whether a state tax on nontribal activities conducted on an Indian Reservation must be apportioned to account for taxes imposed on those same activities by the Indian Tribe."

Respectfully submitted,

Sarah M. Singleton

SARAH M. SINGLETON
Counsel of Record

EDMUND H. KENDRICK
GALEN M. BULLER
Of Counsel

MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504
(505) 982-3873
Counsel for Amicus Curiae
New Mexico Oil & Gas Association

AMICUS CURIAE

BRIEF

No. 87-1327

In The
Supreme Court of the United States
October Term, 1987

COTTON PETROLEUM CORPORATION, et al.,
Appellants,
v.
STATE OF NEW MEXICO, et al.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

BRIEF OF AMICI CURIAE COUNCIL OF ENERGY RESOURCE TRIBES AND SHOSHONE-BANNOCK TRIBES

FAITH R. ROESSEL*
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036
(202) 785-4166

Counsel for Council of Energy Resource Tribes

JEANETTE WOLFLEY
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-2113

Counsel for Shoshone-Bannock Tribes

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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INTEREST OF AMICI CURIAE[1]

Amici Council of Energy Resource Tribes (CERT) is a national organization whose members are 43 federally-

[1] Pursuant to Rule 36.2, written consents from counsel of record for all parties to this proceeding are being filed with the Clerk of this Court with this Brief.

recognized Indian tribes, including the Jicarilla Apache Tribe on whose lands appellant Cotton Petroleum conducts its oil and gas activity. *Amici* Shoshone-Bannock Tribes are members of CERT and are organized pursuant to the Indian Reorganization Act of 1934.

CERT and the Shoshone-Bannock Tribes have a direct interest in the outcome of this case. CERT's 43 member tribes represent a poulation of over one-half of all Indians living on reservations and a land-base equivalent to more than one-half of the Indian reservation lands in this country. CERT estimates that approximately 15% of the nation's energy reserves are located on or under the lands of CERT tribes. CERT was formed in 1975 to provide member tribes with professional assistance in the protection, management, and development of their energy resources. In pursuit of these objectives, the CERT tribes have entered into numerous leases and other contractual agreements with non-Indian companies to develop tribal energy resources.

State taxation of tribal resources is the single largest source of economic loss from reservation economies. CERT studies indicate that merely to achieve a rate of growth that keeps pace with tribal population increases (2.5%), and with inflation (4%-5%), will require a tribe to sustain an economic growth of 8%-10% per year for the next 21 years. At the same time CERT tribes lose an estimated $190 million per year due to state taxes imposed on minerals and energy resources extracted from tribal lands. The preferred alternative is to retain those revenues on the reservation for investment capital. Allowing states to tax non-Indian producers engaged in oil and gas development under the 1938 Indian Mineral Leasing Act will reduce the tribe's share of revenue from existing and future mineral development on their reservations.

CERT tribes engage in extensive energy development. Nineteen of the 43 CERT member tribes have active energy production on their lands, and another seven CERT tribes are exploring their development and production options. Twenty-seven of the 43 CERT tribes have, in place, a tribal taxation program; an additional 12 other tribes are in the process of finalizing their tax codes; and the balance of CERT tribes are studying the possibility. CERT member tribes are located in sixteen states. *All* 16 states presently levy some form of state tax on those tribal mineral operations.

Energy revenues represent the single most important source of funds available for maintaining tribal governments and providing governmental services to all persons, Indian and non-Indian alike and, hence, for implementing the federal policy of strengthening tribal economic self-sufficiency and sovereignty. State taxation of tribal natural resources, however, defeats those objectives.

Federal laws govern unequivocally *all* mineral development on Indian lands. Yet *amici* continue to expend tribal resources on a case-by-case basis to defend their taxing power against state taxation of tribal mineral resources. *Amici* ask this Court for uniform protection of their natural resources to end this case-by-case evaluation of state taxation.

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SUMMARY OF ARGUMENT

Extensive federal laws and regulations control mineral resource development on tribal lands and preempts any state taxing authority on Indian trust lands. When Congress acts according to a constitutional power, the resulting federal law may preempt or preclude state laws by the force of the Supremacy Clause. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). Applying the preemption doctrine in this case compels the conclusion that no room remains for New Mexico's severance taxes in the comprehensive field of Indian mineral leasing. The 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396 (1982), and the 1982 Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1982), both provide broad and exclusive regulation of Indian mineral leases. Both Cotton Petroleum and the Jicarilla Apache Tribe are subject to the 1938 Act. Jurisdictional Statement at 15 n.12, *Cotton Petroleum* (No. 87-1327).

Independent of whether the state taxes are federally preempted, the state severance taxes infringe on the Jicarilla Apache Tribe's ability to govern itself and its members. Taxation is an inherent attribute of tribal self-government. The state severance taxes impermissibly deplete the tribe's mineral revenues. This restricts the tribe's ability to make governmental choices.

Finally, in response to the Court's question of whether tribes ought to be treated as states for apportionment purposes under the Commerce Clause, *amici* first recall that longstanding principle that Indian tribes are separate sovereigns within the Commerce Clause. *See generally Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Like states and foreign nations, however, tribes are separate sovereigns with the inherent power to tax. As a taxing sovereign similar to states or foreign nations, the tribes' reservation boundaries warrant the recognition accorded to the territories of the other two sovereigns. Here, the Jicarilla Apache Tribe is the only sovereign with the territorial nexus to impose a severance tax, and New Mexico has no territorial nexus upon which to levy a severance tax, as instructed by *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

ARGUMENT

I. The 1938 Indian Mineral Leasing Act And The 1982 Indian Mineral Development Act Leave No Room For State Taxation

The 1938 Indian Mineral Leasing Act and the subsequent 1982 Indian Mineral Development Act govern comprehensively *all* oil and gas activity carried out by Cotton Petroleum, lessee, and the Jicarilla Apache Tribe, lessor.[2] Accordingly, the Court must look to those statutes and the implementing regulations to determine whether Congress has so pervasively occupied the field that no room

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[2] The Cotton Petroleum leases were issued by the Jicarilla Apache Tribe under the authority of 25 U.S.C. § 396(a) (1982), and are administered by the Secretary of the Interior and the Jicarilla Apache Tribe. Jurisdictional Statement at 4, *Cotton Petroleum* (No. 87-1327).

is left for the state to supplement it.[3] By application of the federal preemption doctrine, the New Mexico severance taxes fail.[4]

The 1938 Indian Mineral Leasing Act authorizes the Secretary of the Interior to assert complete control over all tribal mineral leases and operations thereunder.[5] The

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[3] *Pacific Gas & Electric v. State Energy Resources Conservation Comm'n*, 461 U.S. 190, 203-04 (1983). The origin of the federal power to invalidate state law arises from the Supremacy Clause of the Constitution, which declares treaties and federal statutes to be "the supreme law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. art. VI, § 2.

[4] The New Mexico statutes at issue are as follows: N.M. Stat. Ann. §§ 7-29-1 to -22 (1978); §§ 7-30-1 to -26 (1978); §§ 7-31-1 to -25 (1978); §§ 7-32-1 to -27 (1978); and §§ 7-34-1 to -20 (1978).

[5] *All* operations under any oil, gas or other mineral lease issued pursuant to the terms of section 396(a) to 396(g) of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of Interior.

1938 Indian Mineral Leasing Act, 25 U.S.C. § 396(d) (1982) (emphasis added).

Further,

> the Secretary of the Interior is authorized to perform *any and all* acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect.

25 U.S.C. § 396 (1982) (emphasis added).

Further,

> the Secretary of the Interior shall have the right to reject *all* bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale.

Id. (emphasis added).

Court has described the 1938 Indian Mineral Leasing Act, noting its exclusive federal scope and the comprehensiveness of the federal regulations:

> Sections 1 through 3 of the 1938 Act establish procedures for leasing oil and gas interests on tribal lands. And § 4 provides that '[a]ll operations under any oil, gas, or other mineral lease issued pursuant to the [Act] shall be subject to the rules and regulations promulgated by the Secretary of Interior.' 25 U.S.C. § 396. Under this grant of authority, the Secretary has issued comprehensive regulations governing the operation of oil and gas leases. *See* 25 C.F.R. § 211 (1984).

Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 199 (1985).

The 1938 Act, therefore, authorizes the Secretary of the Interior to promulgate extensive regulations regarding mineral development on Indian lands. This includes the authority to inspect premises, to determine royalties, to oversee production, to receive reports and payments of revenue from development, to impose penalties against lessees, and the overriding authority to approve, deny, change or reauthorize lease contracts. *See* 25 C.F.R. § 211 (1987).[6]

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[6] The regulations pertaining to mineral resource development on Indian reservations are as extensive as those in the federal field of Indian trading and forest management. *Compare*, 25 C.F.R. §§ 211.1-.30 (1987) (Regulations pursuant to the Secretary of the Interior's authority over Indian mineral development) *with* 25 C.F.R. §§ 141.13, .14, .4 (1981) (Regulations of the Secretary of the Interior over Indian forestry development); *and* 25 C.F.R. §§ 251.14, .16-.19, .21-.25 (1971) (Regulations of Commissioner of Indian Affairs to regulate Indian traders).

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Other extensive federal regulations govern oil and gas activity on federal lands, including Indian trust lands. 43 C.F.R. §§ 3160-62 (1987). These sections regulate location and drilling of wells, subsequent well operations, recordkeeping, well abandonment, and environmental standards. Again, it is the federal presence, not the state, that is preeminent in regard to oil and gas development on tribal lands.

Although the federal acts are regulatory in nature, the basic purpose of the 1938 Act is to "maximize tribal revenues from reservation lands." *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. at 200. Three major goals of the 1938 Act have been identified: to achieve uniformity in law governing mineral leases on Indian lands, to bring all mineral-leasing matters in harmony with the Indian Reorganization Act (IRA), and to ensure that Indians receive the greatest return from their property. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 n.5 (1985). *Accord, Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 796 (9th Cir. 1986); *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1981),

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In the fields of Indian trader regulation and timber regulation this Court has held that federal statutory authority preempted state law. *See Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965) ("Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders."); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 138 (1980) ("We held that the [motor carrier and use fuel] taxes are preempted by federal law. . . ."). The comparably extensive federal regulation of tribal mineral resource development should also preempt state law, including taxation.

aff'd., 108 S.Ct. 685 (January 12, 1988). Each of the 1938 Act's three purposes is frustrated by New Mexico's severance taxes.

First, New Mexico's taxes disrupt the Congressional intent for uniformity of Indian mineral leasing law. Up until the 1938 Act, Congress regulated Indian mineral leases through various federal statutes dating back to as early as 1891.[7] The 1938 Act was intended to bring about from the earlier statutes a uniform federal policy dealing with Indian mineral regulation. This Court has settled that the 1938 Act contained no provision authorizing state taxation of tribal royalty income. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("Nothing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act."). Likewise, nothing in the Act or its legislative history supports any delegation of authority from the Department of Interior to the states regarding taxation of non-Indian interests.[8]

[7] *See* Act of Feb. 28, 1891, ch. 383, 26 Stat. 795 (codified at 25 U.S.C. § 397 (1982)); Act of June 30, 1919, ch. 4, 41 Stat. 3, 31 (codified as amended at 25 U.S.C. § 399 (1982)); Act of May 29, 1924, ch. 210, 43 Stat. 244 (codified at 25 U.S.C. § 398 (1982)); Act of April 17, 1926, ch. 156, 44 Stat. 300 (codified at 25 U.S.C. §400a (1982)); and Act of March 3, 1927, ch. 299, 44 Stat. 1347 (codified as amended at 25 U.S.C. §§ 398a-398e (1982)).

[8] The Congress will provide express language to permit state taxation when it wishes to do so. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985). The 1924 Act provided that "the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located." *Id.*

(Continued on following page)

Second, the state severance taxes conflict with the 1938 Act's purpose to harmonize Indian mineral leasing with the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (1982). The Jicarilla Apache Tribe is organized under the Indian Reorganization Act with an authorized constitution which permits tribal taxes. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134-35 (1982). The purpose of the IRA was " 'to rehabilitate the Indian's economic life,' " and " 'to give the Indians the control of their own property.' " *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11,125 (1934) (remarks of Sen. Wheeler)). The IRA's purpose to preserve Indian lands and promote self-government repudiated the policy of allotment laws and sale of surplus reservation lands. *Mattz v. Arnett*, 412 U.S. 481, 496 n.18 (1973). The IRA thereby foreclosed any further non-Indian or state incursions upon Indian lands. New Mexico's taxes, however, contradict the objectives of economic self-sufficiency and self-government intended by the IRA and the 1938 Act.

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at 763. In interpreting the 1924 Act to determine whether the 1938 Act incorporated the state taxing authority, the Court held the 1938 Indian Mineral Leasing Act did not authorize Montana to impose taxes on tribal royalty interests under oil and gas leases issued to non-Indian lessees. *Id.* at 767. *See also, Commonwealth Edison v. Montana*, 453 U.S. 609 (1981). In the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 49, 50, 181, 351 (1982), Congress expressly authorized the states to impose severance taxes on federal non-trust lessees. The Court held the state taxes do not conflict with the purpose of the 1920 Act. The 1920 Act is inapposite here; since this case involves a lessee on Indian trust lands.

Third, Cotton's payment of a state tax diminishes the return the Jicarilla Apache Tribe will be able to realize from its mineral resources and thereby conflicts with the 1938 Act's overriding goal: to maximize tribal revenues. The extraction of oil, as a depletable resource, permanently diminishes the value of the Jicarilla Apache Tribe's land. With this starting point the Tribe begins at a disadvantage and must maximize its tax revenue to provide essential governmental services to tribal and non-tribal members. At the same time, however, New Mexico imposes its severance taxes on natural resources held in trust for the Tribe. Yet, no justification can be made for New Mexico's real property tax on tribal trust lands. "In many respects a severance tax is like a real property tax." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625 (1981). At the expense of full tribal self-sufficiency and economic development, New Mexico derives a direct benefit that approaches a "windfall."[9] This conflicts with the overriding intent of the 1938 Act, which is that the Indians receive the greatest return from their property.

Congress has continued its exclusive oversight of tribal resource development with passage of the Indian Mineral

[9] The State of New Mexico asserts:

> Cotton, a non-Indian producer, is complaining, in essence, that it is not allowed a 'windfall' profit because it is severing oil and gas in New Mexico but from within a reservation.

Jurisdictional Statement at 16.

There is no depletion of state natural resources for which a severance tax would be justified, only a depletion of tribal natural resources. Instead, New Mexico receives the "windfall." Certainly, the tribe does not.

Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1982). That Act provides tribes with the ability to deal more effectively with their mineral resources and realize a greater return on those resources through innovative, flexible business arrangements. H.R. Rep. No. 746, 97th Cong., 2d Sess. 3, *reprinted in* 4 1982 U.S. Code Cong. & Admin. News 3465. The 1982 Act is a companion to the 1938 Act, providing tribes with additional mineral resource agreement alternatives not previously available. The 1982 Act also does not authorize state taxation.[10]

By operation of the 1938 Act's regulatory scheme, where a state tax in fact falls on the real property of the tribe, within the exterior boundaries of its trust lands, and when the tribe imposes a tax similar to the state tax in question, there is no need for the Court to balance interests.[11] Moreover, Congress in the 1938 Act has already balanced the interests to preempt state taxes. New Mexico's severance tax is an attempt to tax value generated on the Jicarilla Apache Reservation—just the type of

[10] As to the 1982 Act, the House Committee on Interior and Insular Affairs rejected an amendment proposed in a statement submitted for the hearing record by the Governor of the State of Montana which would have had the effect of authorizing state taxation of the non-Indian portions of, or activity under, a tribal Minerals Agreement authorized pursuant to the 1982 Act. 4 1982 U.S. Code Cong. & Admin. News at 3471. The rejection of this amendment indicates a decided Congressional intent that all parties to mineral resource agreements remain free from the imposition of state taxation.

[11] Balancing of interests occurs in some circumstances in Indian cases as a counterweight to the broad preemption principles which apply in Indian law. In traditional preemption analysis there is no balancing. Here, the federal statutes meet tradi-

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state tax repeatedly struck down by this Court. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980); *Ramah Navajo School Bd., Inc. v. Bureau of New Mexico,* 458 U.S. 832 (1982).

II. New Mexico's Severance Taxes Infringe On The Jicarilla Apache Tribe's Inherent Sovereignty

The self-government doctrine is a separate barrier to state regulation, distinct from federal preemption. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-43 (1980). New Mexico's taxes fail because infringement on tribal self-government "can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Id.* at 143.

The seminal case, *Williams v. Lee,* 358 U.S. 217 (1959), articulated the test:

> [E]ssentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Id. at 220.

Congress has not authorized state taxation of Indian minerals on tribal lands. *See* 1938 Indian Mineral Leasing Act, *supra.* Despite the absence of Congressional authorization, New Mexico has imposed its severance taxes under

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tional preemption standards. *Pacific Gas & Electric v. State Energy Resources Conservation Comm'n,* 461 U.S. 190, 213 (1983). The Court will find a conflict where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 204 (quoting, *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)).

the theory that there is no economic harm to the Jicarilla Apache Tribe. Jurisdictional Statement at 4-5, *Cotton Petroleum* (No. 87-1327).

New Mexico's economic impact theory is mistaken, for it would allow a state tax to be imposed on a non-Indian doing business on the reservation unless and until the economic burden either halted or significantly disrupted the tribal government. The tribe's interests, however, cannot be weighed apart from "traditional notions of Indian sovereignty and the Congressional goal of self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. —, 107 S.Ct. 1083 (1987). Congress continues to express such a goal and policy.[12] Tribal sovereignty can be—and in this case was—infringed impermissibly, even assuming that the state's economic impact threshold was not met.

Now Mexico's test fails because it considers only actual economic impact and ignores the impact of the taxes upon federal and tribal interests in strengthening tribal sovereignty. As with any other sovereign, an Indian tribe's interests are not exclusively economic, but are also governmental and regulatory. Taxing members and non-

[12] *See* Indian Self-Determination and Educational Assistance Act, H.R. 1223, 100th Cong., 1st Sess. 134 Cong. Rec. S6949 (1987) (passed the Senate May 27, 1988), 133 Cong. Rec. H9018 (1987) (passed the House October 27, 1987); Indian Financing Act of 1974 Amendments, S. 1360, 100th Cong., 1st Sess. 133 Cong. Rec. S16,368 (1987) (passed the Senate November 17, 1987); Indian Economic Development Act of 1987, S. 788, 100th Cong., 1st Sess. (1987); and Indian Development Finance Corporation Act, H.R. 4248, 100th Cong., 2d Sess. (1988).

members alike is an essential attribute of tribal self-government. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985). Taxation as a function of governmental responsibility has been recognized by the Court with this very tribe.

> This power enables a tribal government to raise revenues for its essential services . . . it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

Merrion, 455 U.S. at 137.

The tribal interest in raising revenues for essential governmental programs "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980).

Unquestionably, the Jicarilla Apache Tribe exercises its governmental prerogative to tax within its reservation boundaries established on February 11, 1887, by Executive Order, 742,315 contiguous acres "all of which are held as tribal trust property." *Id.* at 133-34. As has been repeatedly stated, "Our cases have recognized that tribal sovereignty contains a significant geographical component." *New Mexico v. Mescalero*, 462 U.S. 324, 336 n.18 (1983). New Mexico's taxes on mineral resources owned by the Jicarilla Apache Tribe are taxes on a "component of the reservation land itself." *Crow Tribe of Indians,*

819 F.2d at 898 (quoting *Crow Tribe of Indians v. Montana,* 650 F.2d 1104, 1117 (9th Cir. 1981)). Similarly, such a "component" owned by the tribe may be managed, severed, sold, and taxed by the "right of reservation Indians to make their own laws and be ruled by them." *Williams v. Lee,* 358 U.S. 217, 220 (1959).

Contrary to the erroneous conclusion of the New Mexico Court of Appeals, the Jicarilla Apache Tribe does suffer an economic impact. Common sense, not conjecture, dictates that the oil and gas, once extracted, are no longer a part of the Jicarilla Apache Tribe's resource base and that business may be lost due to dual taxation by the Tribe and the State. The New Mexico Court's view that a tribe's self-government is not "infringed" is both illogical and contrary to established federal law.

When infringement on tribal self-government is premised only on economic harm, tribes are placed in an anomalous position. Such a test establishes an incentive against self-sufficiency. Those tribes best *able* to show economic harm resulting from a state severance tax will be those most economically deprived, the most dependent on non-tribal and federal resources, and the least capable of self-sufficiency. Those tribes *unable* to show infringement premised on pure economic harm will be those most successful in obtaining revenues from development of tribal minerals, and state taxation would pose a significant disincentive toward economic development which afforded such success. Therefore, basing infringement solely on economics usurps the "overriding [Congressional] goal of encouraging tribal self-sufficiency."

III. Given The Previous Grounds For Invalidating The State Taxes, This Court Should Not Reach The Commerce Clause Issue

Under the preemption and infringement on sovereignty arguments set out above, the Court has a clear basis, apart from the Commerce Clause, for invalidating the New Mexico taxes as applied to Cotton Petroleum in this case. It is therefore unnecessary for the Court to even address any asserted Commerce Clause issues. *Blum v. Bacon,* 457 U.S. 132, 137 (1982) (The Court declined to address an equal protection claim where state laws were invalidated by a federal regulation under the Supremacy Clause). *Id.* at 145-46. *Amici* ask the Court to decline such an invitation urged by Appellant.

IV. If The Court Reaches The Commerce Clause Issue, Tribes Are Distinct Sovereigns Whose Lands Are Protected From The Imposition Of State Severance Taxes

The Commerce Clause of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, § 8, cl.3. The Commerce Clause on its face distinguishes three sovereigns.

> In this clause [Indian tribes] are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states comprising the union. . . . The objects to which the powers of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831).

Thus, Indian tribes are sovereigns separate and distinct from foreign nations and states in the Commerce Clause.

The Commerce Clause has traditionally had a role in regulating the marketplace when two sovereigns compete for the same tax dollars. "The very purpose of the Commerce Clause was to create an area of free trade among the several states." *McLeod v. J.E. Dilworth Co.,* 322 U.S. 327, 330-31 (1944). Goods are intended to flow in the national common market without bearing an undue burden in taxation placed by multiple sovereigns.

In this case, Cotton Petroleum challenges New Mexico's imposition of two severance taxes on Cotton's production of oil and gas on tribal trust land on the Jicarilla Apache Reservation. This Court has already confirmed the Jicarilla Apache Tribe's authority to impose oil and gas severance taxes on those lands. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982).

If this Court finds it necessary to look to the Commerce Clause, the application of New Mexico's taxes to Cotton cannot stand. The status of the Jicarilla Apache Tribe as a third sovereign within the scope of the Commerce Clause requires that the Tribe's boundaries be accorded at least the same protection as state boundaries. Under traditional Commerce Clause analysis, the Tribe as a separate sovereign has the requisite territorial nexus to tax the severance of oil and gas on its tribal trust land on the Reservation.

In *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 617 (1981), this Court explained:

> [T]he only nexus of the severance of coal is established in Montana. . . . Nor is there any question here regarding apportionment or potential multiple taxation, for as the state court observed, 'the severance can occur in no other state' and 'no other state can tax the severance.'

As in that case, only the Jicarilla Apache Tribe can tax the severance of oil and gas on tribal trust land within its Reservation boundaries.[13]

To allow the state to tax disregards the fact that New Mexico is depleting the tribe's resource base[14] and gives

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[13] Further, allowing New Mexico's severance taxes to stand would be allowing the State to accomplish indirectly what it cannot do directly. *See Thurlow v. Massachusetts,* 46 U.S. (5 How.) 504 (1847).

It is clear that New Mexico cannot tax tribal trust lands and resources on the Reservation. *See e.g., Blue Jacket v. Commissioners of Johnson County,* 72 U.S. (5 Wall.) 737 (1867). This Court has recognized that severance taxes are like real property taxes. *Commonwealth Edison Co.,* 453 U.S. at 624. In this case, New Mexico taxes the extraction of valuable tribal mineral resources from tribal land and impermissibly burdens the trust property and resources.

[14] A clearer case of reservation-generated value would be hard to find. As the Court recognized in *Commonwealth Edison Co. v. Montana:*

> The entire value of the coal, before transportation, originates in the State, and mining of the coal *depletes the resource base and wealth of the State,* thereby *diminishing a future source of taxes and economic activity.*

453 U.S. at 624 (emphasis added).

In the present case, "Jicarilla Apache Tribe" can be substituted for "State" in this quotation and the statement would be equally true.

New Mexico the right to control the terms of resource development on another sovereign.[15]

Therefore, *Commonwealth Edison* supports the Court finding against New Mexico's taxes imposed on a natural resource extracted on tribal trust lands.

CONCLUSION

For the reasons stated, the judgment of the New Mexico Court of Appeals should be reversed.

Respectfully submitted,

FAITH R. ROESSEL
Counsel of Record
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036
(202) 785-4166

JEANETTE WOLFLEY
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-2113

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[15] We are not convinced that the Commerce Clause, of its own force, gives the residents of one State the right to control in this fashion the terms of resource development and depletion in a sister state.

Commonwealth Edison Co. v. Montana, 453 U.S. at 619.

AMICUS CURIAE

BRIEF

(14)

Supreme Court, U.S.
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No. 87-1327

In The

Supreme Court of the United States

October Term, 1987

COTTON PETROLEUM CORPORATION, et al.

Appellants,

v.

STATE OF NEW MEXICO, et al.

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

BRIEF OF AMICI BLACKFEET TRIBE OF INDIANS AND THE UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION

JEANNE S. WHITEING
Counsel of Record
ROBERT S. THOMPSON, III
WHITEING, THOMPSON & WHITE
6684 Gunpark Drive
Boulder, CO 80301
303-530-1335

Counsel for Amici

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI

The Blackfeet Tribe of Indians of the Blackfeet Reservation, Montana, and the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, are federally recognized tribes organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 986. Both Tribes rely primarily on royalties generated by oil and gas production, and on other oil and gas related revenues, to finance governmental services to Indian and non-Indian residents of their respective reservations. Moreover, these revenues provide the major source of income to the Tribes for all purposes. State taxation of these Indian-owned resources defeats the ability of the Tribes to control their tribal resources, to impose tax rates required to finance governmental operations, and to realize the full economic benefit from development of their resources.

Since 1976, the Blackfeet Tribe has imposed taxes on oil and gas production within the Reservation in order to finance and strengthen tribal policies, to provide members and non-members with as many governmental services as the Tribe can afford, and to protect the resources and environment of the Reservation. The Tribe imposes a severance tax, privilege tax and resource indemnity trust tax, which together total less than 3% of production. The State of Montana imposes five separate oil and gas taxes on production within the Reservation. The total state oil and gas tax burden is over 20% depending on the kind of well and production involved. The Tribe, on the other hand, traditionally has received a 12½% royalty.

The Ute Indian Tribe wishes to adopt a tribal oil and gas severance tax, but has been reluctant to impose the

tax because of concern about the economic effect of the tax when combined with state taxes. The total Utah tax burden on reservation oil and gas producers exceeds $14^1/_2$%, including oil and gas taxes and other taxes. The Ute Tribe is thus placed in the position of imposing a tax, and taking the chance that the increased burden will deter future development and expedite the abandonment of marginal oil and gas operations, or not imposing a tax so as to preserve existing royalty rates. Given present market conditions, the Ute Tribe may be prevented from imposing any tribal taxes as long as the State is allowed to impose the full array of its taxes on Reservation producers.

In the case of both Tribes, the States realize a far greater benefit than the Tribes from the reservation mineral development. The States' total tax benefit exceeds the mineral income of the Amici Tribes by 13.8% to 25%. However, despite the significant tax revenues collected by the States of Montana and Utah, it is the Tribes and the Federal government that provide essential governmental services, employment, social services, oil and gas regulation, and oversee compliance with environmental mandates. In these circumstances, the major effect of state taxation is to prohibit or severely limit the self-determination and attainment of self-sufficiency by the Tribes.

SUMMARY OF ARGUMENT

New Mexico's oil and gas taxes on production within the Jicarilla Apache Tribe's Reservation are preempted by comprehensive federal statutes and regulations which

govern every aspect of Indian mineral development. Specifically, the state taxes interfere with the purposes and policies of the Indian Mineral Leasing Act of 1938, and the Indian Reorganization Act of 1934, in particular the Tribe's ability to maximize revenues from mineral development and to control tribal lands and resources. New Mexico's only apparent interest in taxing reservation production is in raising general revenues, an interest which is insufficient to overcome the direct and fundamental conflicts with federal law and policy.

Alternatively, New Mexico's taxes are invalid under the Indian Commerce Clause. Indian commerce is entitled to protection from state taxation under the Indian Commerce Clause at least to the extent interstate commerce is entitled to protection under the Interstate Commerce Clause. The severance of reservation minerals can occur only within the reservation, and can be taxed only by the Tribe. No allocation or apportionment of taxes is required.

The Interstate Commerce Clause does not apply to commerce involving Indian tribes and the states in which they are located. "Interstate" and "Indian" commerce are treated separately in the Commerce Clause, and have been regulated separately, Indian commerce being subject historically to a higher degree of protection and federal control.

ARGUMENT

I. Federal Laws and Policies Intended to Promote Tribal Economic Development and Self-Sufficiency Preempt New Mexico's State Taxes

This case concerns the application of certain New Mexico oil and gas taxes to the production of hydrocarbons from lands of the Jicarilla Apache Tribe held in trust by the United States. The Blackfeet Indian Tribe and Ute Indian Tribe, as *amici curiae*, suggest to the Court that such taxes impermissibly retard the goals of the Indian Mineral Leasing Act of 1938, 52 Stat. 347, 25 U.S.C. 396a-396g, to promote tribal self-government and economic development, and are preempted by the Federal Government's pervasive control of mineral development occurring on tribal land.

The oil and gas underlying the Jicarilla Apache Reservation, like the majority of the oil and gas resources of the Amici Tribes, are produced pursuant to the comprehensive mineral development scheme established by the Indian Mineral Leasing Act of 1938 (hereinafter "the 1938 Act"). *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 135 (1982). These minerals are owned by the Jicarilla Apache Tribe and are a "component of the reservation land itself." *Crow Tribe v. Montana*, 819 F.2d 895, 902 (9th Cir. 1987), quoting *Crow Tribe v. Montana*, 650 F.2d 1104, 1117 (1981).

There is no specific congressional consent to imposition of the taxes at issue, and similar state taxes, as applied to mineral revenues of both Indians and non-Indians, have been viewed as preempted by the terms, goals and effects of the 1938 Act. *Crow Tribe v. Montana*,

819 F.2d 895 (9th Cir. 1987); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985).[1] Where, as here, congressional consent to state jurisdiction is lacking and the on-reservation activity is the object of broad federal control, this Court has instituted a balancing test by calling "for a particularized inquiry into the nature of state, federal and tribal interests at stake, to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). This approach has been further refined through this Court's ruling that state jurisdiction over reservation based activities is preempted:

> 'if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.' The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development.

California v. Cabazon Band of Mission Indians, 480 U.S. ___, 107 S.Ct. 1083, 94 L.Ed.2d 244, 259 (1987), quoting *New*

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[1] This Court has sustained the application of oil and gas gross proceeds and net proceeds tax to a non-Indian company producing minerals on an Indian reservation. *British-American Oil Producing Company v. Board of Equalization*, 299 U.S. 159 (1936). There, however, the taxes survived challenge because Congress expressly consented to their imposition in the Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. 398. The Court noted "that the State is without power to apply either [tax] to the production under this lease, save and except as Congress may have given its assent," *id.* at 161; thus indicating its view that state taxation of producers' interests, like Indian royalty interests, requires Congressional consent.

Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983).

In accordance with this test, it is only in certain limited circumstances, i.e. where state interests on the reservation are substantial and tribal and federal interests nominal, that state law and state taxes may be imposed. *See Washington v. Confederated Tribes*, 447 U.S. 134 (1980). Such circumstances are clearly not present here.

A. The Scope and Nature of Federal and Tribal Interests Under the 1938 Act Preempt State Taxation.

Under the approach mandated by *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, and *California v. Cabazon Band of Mission Indians*, 480 U.S. ___, 107 S.Ct. 1083, 94 L.Ed.2d 244, the initial inquiry in this case should be directed at the existence and breadth of the federal and tribal interests at issue. There are few Indian activities subject to greater federal regulation and control than Indian mineral development. *See* 25 U.S.C. 396a-396g; 25 U.S.C. 2101-2108; 30 C.F.R. Chap. II; 25 C.F.R. 216.1-216.12; 43 C.F.R. Part 3160. There is then equal, if not greater, federal regulation and concern than that previously found by this Court to be of preemptive effect in *White Mountain Apache Tribe v. Bracker*.[2] The interests of the Federal Government in Indian mineral

[2] *Compare* the statutes and regulations governing Indian mineral development set forth above *with* 25 U.S.C. 406, 407, 466 (1976); 25 *C.F.R.* Parts 163 and 164, the Secretary of the Interior's authority over Indian forestry development.

development, as embodied in the 1938 Act, are three fold: (1) to achieve uniformity in tribal leasing patterns; (2) to increase Indian authority over tribal mineral leases by bringing development into harmony with the purposes of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. 461-494; and (3) to protect the tribes' economic return on their property. *Montana v. Blackfeet Tribe*, 471 U.S. at 767 n.5; *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782 (9th Cir. 1986).

In order to achieve the ends of the 1938 Act, Congress deliberately entrusted the Secretary of the Interior with comprehensive mineral development responsibilities for tribal land.[3] *Id.* The Secretary of the Interior has, in turn, "issued comprehensive regulations governing the operation of oil and gas leases." *Kerr-McGee Corporation v. Navajo Tribe*, 471 U.S. ___, 85 L.Ed.2d 200, 204 (1985). As a result, the 1938 Act and the regulations of the Secretary of the Interior control all aspects of tribal oil and gas operations (from the acquisition of leases, to the development of rental, royalty, and operational responsibilities, to a detailed and comprehensive federal and

[3] With respect to the pervasive role of the Secretary of the Interior in the production of tribal minerals, he is empowered to "reject all [mineral lease] bids whenever in his judgment the interest of the Indians will be served," 25 U.S.C. 396b, and:

> *All* operations under any oil, gas or other mineral lease issued pursuant to the terms of section 396a to 396(g) of this title or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of Interior.

25 U.S.C. 396d [emphasis added]

tribal regulatory program covering diligent development operations, protection against drainage, spacing, drilling supervision and maintenance, groundwater protection, environmental controls, and the abandoning of wells.) *See* 25 C.F.R. Part 211 and 43 C.F.R. Part 3160.

The Federal Government's regulation and control of tribal minerals is in many instances supplemented by efforts of the affected Indian tribe. The Jicarilla Apache Tribe performs its oil and gas activities pursuant to the provisions of Article XI(a)(3) of its Constitution, which reads:

> *Resource Development.* Tribal lands and natural resources may be developed for industrial or other purposes providing that such development is designed for the general welfare of the Tribe as a whole. The tribal council may enact ordinances to govern development of tribal lands and other resources.

Amici Tribes similarly regulate mineral development on their respective reservations. *See* Constitution and Bylaws of the Blackfeet Tribe, Article VI, Section 1(e); Constitution and Bylaws of the Ute Tribe, Article VI, Section 1(1).

Pursuant to these separate authorities, the Federal Government and the Jicarilla Apache Tribe have instituted a broad range of governmental and administrative functions related to oil and gas development on the Reservation.[4] The Federal Government, through the Bureau

[4] The combined functions of the Tribe, Bureau of Indian Affairs and Bureau of Land Management result in a predominantly federal program that exercises control over site investigation, drilling applications, drilling and well operations,

(Continued on following page)

of Indian Affairs, has created a local real estate services branch which provides substantial oil and gas supervisory services, particularly in the area of surface protection, lease issuance, and royalty and rental compliance. (Plaintiff's Trial brief p. 21). The Bureau of Land Management also provides comprehensive oil and gas services, regulating virtually every step of a well operator's drilling and plugging operations.[5]

The sole function performed by most states during the exploration and development phase of a reservation well consists of assuring that the spacing pattern of the tribe, Bureau of Indian Affairs and Bureau of Land Management complies with the state's spacing requirements. Operators on a reservation comply with state well spacing guidelines, however, only because the Bureau of Land Management has opted to use the state system. As a practical and legal matter, states may only participate in the spacing of wells on a reservation for so long and to

(Continued from previous page)

rights-of-way, production verification, and environmental protection compliance. (Plaintiff's Trial brief at 24-25). Thereafter, royalties of the Tribe are overseen, collected and audited through the Minerals Management Service. See 30 C.F.R. Chap. II. This regulatory system is so extensive that none of the Appellant's employees have encountered New Mexico supervisors or enforcement personnel on the Reservation since 1976. (Plaintiff's Trial brief at 23).

[5] For example, over the five year period at issue, the Bureau of Indian Affairs and the Bureau of Land Management collectively incurred $1,206,800 in oil and gas related expenditures on the Jicarilla Reservation. *Id.* The Tribe, as well, has its own oil and gas administration program, which expended $738,358 for comprehensive oil and gas services over the five years in question. (Plaintiff's Trial Brief at 22.)

such an extent as the Secretary of the Interior allows. *Kirkpatrick Oil and Gas Company v. United States*, 675 F.2d 1122 (10th Cir. 1982); *Samedan Oil Corporation v. Cotton Petroleum Corporation*, 466 F. Supp. 521 (W.D. Okla. 1978). *See also Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782.

The Federal Government's comprehensive regulation of mineral development under the 1938 Act has essentially "left the State with no duties or responsibilities." *Warren Trading Post v. Arizona*, 380 U.S. 685, 691 (1965). Federal regulation "takes the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs [and Bureau of Land Management and Minerals Management Service]." *White Mountain Apache v. Bracker*, 418 U.S. at 145. "There is no room for these [state] taxes in the comprehensive federal regulatory scheme." *Id.* at 148.

B. New Mexico's Taxes Are Incompatible with the 1938 Act Goals of Increasing the Economic Return on Indian Minerals and with Increasing Tribal Authority Over Mineral Leases.

Not only is there no room for the oil and gas taxes of states within the comprehensive federal statutory and regulatory format governing tribal mineral development, but such taxes are also incompatible with two of the primary goals of the 1938 Act. State taxes directly interfere with the congressional purpose of ensuring "that Indians receive 'the greatest return from their property',"

and thwart the policy of the 1938 Act to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act [25 U.S.C. 461-494.]" *Montana v. Blackfeet Tribe*. 471 U.S. at 767 n.5 (citations omitted).

Although Congress has on occasion authorized states to tax mineral activities on Indian lands,[6] it chose not to grant its assent to the taxation of mineral development occurring under the 1938 Act. *Crow Tribe v. Montana*, 819 F.2d 895. This seemingly deliberate omission of taxing authority from the 1938 Act indicates that Congress did not intend for States to tax the non-Indian producers of tribal minerals. *Cf. British-American Oil Producing Company v. Board of Equalization*, 299 U.S. 159, 161 (1936); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378-382 (1982).[7] Moreover, it was the withholding of consent to state taxation in the 1938 Act that led this Court to hold state severance and net proceeds taxes inapplicable to tribal oil and gas royalty payments. *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985).

The absence of congressional consent is consistent with and supports the Act's purpose "to ensure that

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[6] *E.g.* Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. 398.

[7] As to the deliberate nature of Congress' silence on state taxation, it is noteworthy that states are specifically authorized to tax lessee production and property on federal lands not held in trust for Indian tribes and individual Indians. 30 U.S.C. 189. Similar to this Court's ruling in *British-American Oil Producing Company*, the express taxation authorization contained in 30 U.S.C. 189 was critical to the Court's finding that Montana's severance tax could be applied to the mining of federal coal in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 631 (1981).

Indians receive 'the greatest return from their property'." *Id.* at 767 n.5, quoting S.Rep. 985, 75th Cong., lst Sess. 2 (1937), and H.R. Rep. 1872, 75th Cong., 3d Sess. 1 (1938). State taxes necessarily conflict with this purpose. When a lessee is forced to remit state taxes for his on-reservation mineral development, such taxes correspondingly reduce those sums available to the tribal lessor as royalty. An Indian tribe, when acting as a governmental entity, is equally limited in the amount of tax it may impose on the lessee's activities by the existence of state taxes. In the instant case, the ability of the Jicarilla Apache Tribe to increase royalty and taxes has been reduced by an amount at least equal to the combined New Mexico tax rate. The simple result, therefore, is that New Mexico's taxes prevent the Jicarilla Apache Tribe from receiving the greatest return from its property. *Crow Tribe v. Montana*, 819 F.2d 895.[8] Montana and Utah taxes have the same effect on Blackfeet and Ute royalties and tax revenues.

In addition to the 1938 Act's purpose of maximizing Indian mineral revenues, it sought to bring tribal mineral

[8] It has been held that the mere fact that a state tax places an Indian tribe at a competitive disadvantage and causes the Indian tribe to forfeit revenues is insufficient to preempt the tax. *Washington v. Confederated Tribes*, 447 U.S. 134 (1980). This decision is, however, inapplicable here. The state tax there was sustained on a finding that the Indian tribe did little more than "market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155. Clearly, tribal minerals are generated solely from an Indian reservation, by activities involving the owner tribe and a producer who receives significant tribal services.

development into harmony with the purpose of the Indian Reorganization Act, 25 U.S.C. 461-494, (hereinafter "the IRA") to provide greater tribal control over reservation lands and resources. *Montana v. Blackfeet Tribe*, 471 U.S. at 767 n.5. The IRA was intended "to rehabilitate the Indian's economic life" and "to give the Indians the control of their own affairs and of their own property." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (citations omitted). Tribal control over mineral development is severely impacted by state taxation. In particular, the timing of development and method of development are affected by state taxation, a matter completely outside of the control of tribes.

Tribal authority to control resource development, like the tribal authority to tax, is an "essential instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 139. The rehabilitation of tribal economic life and tribal ability to control and manage reservation resources and property is directly impaired by state taxation. For so long as states are allowed to drain from Indian reservations monies properly those of the tribes, state taxation will serve to diminish the tribes' ability to accomplish those goals of the IRA and the 1938 Act of "self-government and territorial management." *Id.*[9]

[9] Nor are the sums collected by states from taxation of Indian minerals insubstantial. For example, during the last five years, Cotton Petroleum, Inc. has paid to New Mexico and its subdivisions taxes of $2,293,000.00. This amount represents revenues which could have been available to the Jicarilla Apache Tribe but for the New Mexico tax scheme.

C. The Interests of New Mexico Are Insufficient to Justify Assertion of State Taxing Authority.

Because state oil and and gas taxes conflict and interfere with the 1938 Act and the purposes and objectives of the Federal Government and Indian tribes in the field of tribal mineral development, this Court must determine the legitimacy of state taxing interests, and the relationship such interests bear to the taxes challenged. *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 148-149. Whether state taxes may lawfully be imposed, in light of state interests, turns upon the test established in *New Mexico v. Mescalero Apache Tribe*:

> The exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the state in connection with on-reservation activity . . . Thus a state seeking to impose a tax on a transaction between a tribe and non-members must ordinarily point to more than its general interest in raising revenues.

462 U.S. 324, 336 (1983).

In this case, New Mexico attempts to reconcile its revenue interest with the services provided by pointing to state expenditures for on-reservation schools and on-reservation roads. The State also relies heavily on the supposed off-reservation services that it provides to the producers of Reservation minerals, such as a market place for Indian oil and gas. This is not a case in which New Mexico seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. New Mexico has been unable to identify a "legitimate regulatory interest served by the taxes they seek to

impose." *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 150; *Crow Tribe v. Montana,* 819 F.2d at 900.[10] The lower court's opinion identified only a state interest in raising general revenue, a purpose not sufficient to justify impeding a federal preemptive interest. *Ramah Navajo School Board v. Bureau of Revenue of New Mexico,* 458 U.S. at 843 n.7; *White Mountain Apache v. Bracker,* 448 U.S. at 148-49; *cf. Merrion v. Jicarilla Apache Tribe,* 455 U.S. at 158 n.26 (state tax on Indian minerals must be fairly related to state services).

Beyond simple revenue collection, there exists no showing in this case of a state interest which would justify or legitimize New Mexico's interference in the Federal Government's comprehensive 1938 Act program. This absence, when combined with the fundamental conflict with federal purposes and policies, requires that such taxes be found to be preempted by the 1938 Act.

II. In the Alternative, If New Mexico's Taxes Are Not Preempted, They Are Invalid Under the Commerce Clause.

New Mexico's taxes were sustained by the court below under the test set out in *Commonwealth Edison Co. v. Montana,* 453 U.S. 609 (1981). The *Commonwealth* test is the traditional "interstate" commerce test under *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), to determine whether state taxes burden "interstate" commerce.

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[10] Even if a legitimate regulatory interest is identified, the state also must show that its tax is tailored to achieve that interest. *Crow Tribe v. Montana,* 819 F.2d at 901. New Mexico has done neither.

The difficulty with applying the *Commonwealth* test in this case is that the commerce involved is commerce between an Indian reservation and the state within which the reservation is located, and not commerce between states. Where Indian commerce is involved, different considerations come into play.

The Indian Commerce Clause is the primary basis for the federal government's broad legislative authority over Indian matters. From the earliest decisions of this Court, the Indian Commerce Clause has been relied upon as the foundation for federal protection of reservation activities from state interference. *See Worcester v. Georgia*, 313 U.S. (6 Pet.) 515, 562-63 (1932):

> The Cherokee nation, then is a distinct community, occupying its own territory. . . .*The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.*

[Emphasis added.] *See also United States v. John*, 437 U.S. 634 (1978); *United States v. Mazurie*, 419 U.S. 544 (1975).

As a result, from the earliest times commerce with Indian tribes has been solely and extensively regulated by the federal government, separate and apart from regulation of interstate commerce. *See* Indian Trade and Intercourse Acts, Act of July 22, 1790, 1 Stat. 137; Act of March 30, 1802, 2 Stat. 139; Act of June 30, 1834, 4 Stat. 729. As the Court said in *Worcester v. Georgia*, 31 U.S. (6 Pet.) at 557:

> The treaties and laws of the United States contemplate the Indian territory as completely separate from that of the state; and provide that all intercourse with them shall be carried on exclusively by the government of the union.

See County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law.") While Indian reservations are no longer completely separate from states, the principles governing a separate treatment of Indian commerce have remained intact. *See Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Central Machinery v. Arizona Tax Comm'n*, 448 U.S. 160 (1980); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973); *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).

In addition, the constitutional limitations governing tribal authority are significantly different than the limitations on state authority because:

> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.

Santa Clara Pueblo v. Martinez, 435 U.S. 49, 56 (1978). *See United States v. Wheeler*, 435 U.S. 313 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896). *See also* F. Cohen, *Handbook of Federal Indian Law* at 664-65 (1982 ed.). Constitutional limitations on states and the federal government do not apply to tribes unless Congress applies these standards legislatively. *Santa Clara Pueblo v. Martinez*, 435 U.S. at 56. Congress has not acted to apply the interstate commerce clause to tribes; instead it is apparent from the Commerce Clause itself that "Indian" commerce and "interstate" commerce are to be treated differently.

This Court's prior decisions teach that the Interstate Commerce Clause does not apply to Indian tribes. Commerce with Indians is the exclusive province of the federal government, subject to separate and distinct treatment and constitutional limitations from that afforded interstate commerce.[11] Indeed, the Indian Commerce Clause has traditionally been used "as a shield to protect Indian tribes from undue state and local interference," and not to authorize such interference. *Merrion v. Jicarilla Apache Tribes*, 455 U.S. 130, 153-54 (1982). *See Morton v. Mancari*, 417 U.S. 535, 552 (1974). Thus the protection given Indian commerce from state burdens has been of the highest degree. *Compare Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 *with Commonwealth Edison v. Montana*, 453 U.S. 609.

Given the clear distinction between interstate and Indian commerce in the Commerce Clause, and the historically separate and different treatment given Indian and interstate commerce, there is virtually no basis on which to conclude that the interstate commerce clause applies to commerce between tribes and the states in

[11] In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 153, the Court noted the "conceptual difficulties" of applying the Interstate Commerce Clause to determine whether tribal taxes burden interstate commerce. Similar "conceptual difficulties" exist, for the reasons described above, in applying the Interstate Commerce Clause to determine whether state taxes burden Indian commerce within a reservation.

which they are located.[12] As this Court has said: "Tribal reservations are not states, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions [ ] that are properly applied to the other." *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143.

Even though the interstate commerce clause may not apply to limit state taxation of reservation activities, the Indian Commerce Clause does limit such taxation. This court has stated that the Indian Commerce Clause, of its own force, may not automatically bar "*all* state taxation of matters significantly touching the political and economic interests of the Tribes." *Washington v. Confederated Tribes*, 447 U.S. 134, 157 (1980) (emphasis added). Amici suggest, however, that certain taxes may be barred by the Indian

[12] Ordinarily Tribes are treated as states only where Congress has specifically so provided. *See e.g.* Indian Tax Status Act, 96 Stat. 2605, 26 U.S.C. 7805 (treating tribal governments as states for certain tax purposes); Food Stamp Act, 7 U.S.C. 2012(n)(2) (defining "State agency" to include "the Tribal organization of an Indian Tribe," as eligible to administer a food stamp program); Area Redevelopment Act, 42 U.S.C. 3106 (defining "local public bodies and agencies" as including "Indian Tribes," eligible for Economic Development Administration grants); Housing and Community Development Act of 1974, 42 U.S.C. 5302(17) (separately defining "Indian Tribe" as among the entities eligible for community development block grants); Safe Drinking Water Amendments of 1986, P.L. 99-339 § 302, 100 Stat. 642, 665 (authorizing EPA "to treat Indian Tribes as States under this title"); Clean Air Act, 42 U.S.C. 7474(c) (specifically providing that the appropriate "Indian governing body" has the authority to redesignate lands within an Indian reservation as "Class I" for air pollution control purposes).

Commerce Clause; particularly where an activity such as severance of minerals on Indian reservations is involved.

The Court has not yet articulated a precise test to determine whether state taxation burdens Indian commerce. The greater degree of federal protection and control of Indian commerce, and the broad preemption of most state taxes, *see* Part I *supra*, suggest that few state burdens on Indian commerce, particularly commerce involving reservation minerals, will be tolerated.

In *Commonwealth Edison v. Montana*, 453 U.S. 609, 617 (1981), the Court specifically acknowledged that there can be only one sovereign with a sufficient nexus to tax the severance of minerals. The Court stated:

> Nor is there any question here regarding apportionment or potential multiple taxation, for as the court observed, 'the severance can occur in no other state' and 'no other state can tax the severance.'

Amici suggest that in this kind of situation, state taxation is barred by the Indian Commerce Clause. It involves "value generated on the reservation," *Washington v. Confederated Tribes*, 447 U.S. at 156-57, the severance of which can occur only on the Reservation. This is not a case where an Indian tribe is marketing a tax exemption. *Id.* It is taxation of a fundamental resource which for the Jicarilla Apache Tribe and the Amici Tribes, represents the single most important source of tribal income. Any burden imposed on this fundamental resource by state taxation reduces tribal income and interferes with basic tribal

self-determination and self-sufficiency, and is therefore subject to the highest degree of protection afforded by the Indian Commerce Clause.[13]

Even under the more minimal protection afforded by the Interstate Commerce Clause, however, state taxation of the severance of reservation minerals would be invalid. As in the case of a state, the severance of a tribe's minerals can occur only within the reservation and not in another "state," and no allocation or apportionment is required. Thus, even under the less protective Interstate Commerce Clause, assuming a tribe is treated like a state, the tribe would be the only sovereign entitled to tax the severance of minerals, and no allocation or apportionment would be necessary. *Commonwealth Edison v. Montana*, 453 U.S. at 617. Moreover, a tribe is the primary provider of the "civilized society," on the reservation, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 138 (citations omitted), and thus would be the primary, and in the case of mineral severance, the only, taxing authority. Of course, the Jicarilla Apache Tribe's oil and gas severance tax has already been upheld under an Interstate Commerce Clause analysis, even though such analysis may not be applicable. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 153.

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[13] In *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832, 846-47 (1982), the Court found it unnecessary to analyze the taxes at issue under the "dormant" Indian Commerce Clause. Assuming that the taxes in this case are not preempted, *see* Part I *supra*, then analysis under the Indian Commerce Clause of the taxes at issue in this case would be appropriate.

There may be other kinds of reservation activities where allocation or apportionment may be required, but it is not necessary in this case to determine the kinds of activities and circumstances where such allocation would be required. Given the specific severance tax at issue here, only the tribe may tax; taxation by the state is invalid under the Indian Commerce Clause.

CONCLUSION

For all of the above reasons, the decision of the New Mexico Court of Appeals should be reversed on the grounds that: the New Mexico taxes at issue are preempted by comprehensive federal statutes and regulations; or in the alternative, the taxes are invalid under the Indian Commerce Clause.

Respectfully submitted,

JEANNE S. WHITEING
Counsel of Record
ROBERT S. THOMPSON, III
WHITEING, THOMPSON & WHITE
6684 Gunpark Drive
Boulder, CO 80301
303-530-1335

Counsel for Amici Tribes

June, 1988

AMICUS CURIAE

BRIEF

(5)

No. 87-1327

In The
Supreme Court of the United States
October Term, 1987

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,
v.
STATE OF NEW MEXICO, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

MOTION OF JICARILLA APACHE TRIBE FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF JICARILLA APACHE TRIBE AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

B. Reid Haltom
Wayne H. Bladh
Nordhaus, Haltom, Taylor,
Taradash & Frye
500 Marquette, N.W. Suite 1050
Albuquerque, New Mexico 87102
(505) 243-4275
*Counsel for Amicus Curiae
Jicarilla Apache Tribe*

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STATE OF NEW MEXICO, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Jicarilla Apache Tribe respectfully moves for leave to file a brief amicus curiae in this appeal. The attorneys for Appellant Cotton Petroleum Corporation have consented to the filing of this brief; the attorneys for Appellee State of New Mexico have refused to consent to the filing of a brief by the Tribe.

This appeal concerns the authority of the State of New Mexico to tax oil and gas production by Cotton Petroleum

on the Jicarilla Apache Reservation. The Jicarilla Apache Tribe is the beneficial owner of those minerals prior to severance and is the tribal government responsible for regulating and providing services to Cotton Petroleum on the reservation in connection with mineral production.

This Court has consistently applied the federal preemption doctrine to implement the overriding congressional goal of tribal self sufficiency and economic development. *California v. Cabazon Band of Mission Indians*, 480 U.S. —, 107 S.Ct. 1083 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). This goal reflects federal commitments to the Indian tribes, not to the non-Indian businesses who operate on the reservation. Thus, the Jicarilla Apache Tribe's interest in the proper development and application of the preemption doctrine on its reservation is much more significant and more enduring than the interest of a single non-Indian business whose presence on the reservation may be transitory.

The outcome of this appeal will directly and immediately impact the Jicarilla Apache Tribe, since the legitimacy of state taxation on the reservation is a major issue in all commercial dealings between the Tribe and non-Indian businesses. Cotton Petroleum Corporation should not be expected to represent adequately the governmental interests of the Jicarilla Apache Tribe, and certainly the State of New Mexico does not purport to represent the interests of the Tribe in this matter.

For these reasons, the Tribe respectfully requests leave of the court to file its brief amicus curiae, which accompanies this motion.

Respectfully Submitted,

B. Reid Haltom
Wayne H. Bladh
Nordhaus, Haltom, Taylor,
Taradash & Frye
500 Marquette, N.W., Suite 1050
Albuquerque, New Mexico 87102

(505) 243-4275

Counsel for Amicus Curiae
Jicarilla Apache Tribe

BRIEF OF JICARILLA APACHE TRIBE AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

The Jicarilla Apache Tribe is an Indian Tribe recognized by the United States government and organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* See, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

The Tribe has entered into five leases with Cotton Petroleum Corporation pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a *et seq.*, for the production of oil and gas from reservation trust lands. Cotton is one of approximately 100 lessees and operators on the reservation and is a relatively small producer owning less than 4% of the total number of wells. The Tribe has issued over 500 oil and gas leases on the reservation under the 1938 Act, 236 of which are active and upon which there are over 2500 wells. The Tribe has not issued any new leases since 1972. Instead, the Tribe has entered into Joint Exploration and Development contracts. The applicability of state production taxes on the reservation has had a direct impact on the Tribe's negotiations with potential oil and gas operators.

The Tribe's stake in oil and gas development on its reservation is much broader than the individual business interest of Cotton. In 1987 oil and gas revenues from royalties, rents and a privilege tax[1] provided approximately sixty-nine percent (69%) of the Tribe's general operating revenues, used to fund the provision of essential governmental services on the reservation, including the police department, tribal court, emergency ambulance ser-

[1]Since 1976 the Tribe also has imposed a severance tax on oil and gas production, with the revenue going into a permanent fund, not available for general operating expenses. In addition, effective with the tax year beginning January 1, 1988, the Tribe has imposed a possessory interest tax on the reservation. As applied to oil and gas production equipment, the tax is assessed at slightly less than 2% of the prior year's production. The possessory interest tax was not in effect when this case was tried, and it was not considered by the courts below.

vices, community services, alcoholic rehabilitation, day care services, elderly care and tribal regulation of oil and gas operations.

The Tribe has an interest in this appeal because state taxes on reservation oil and gas production directly increase the operating costs of the Tribe's non-Indian lessees and joint venturers. State taxes limit the level of taxation and regulation the Tribe can reasonably impose, and have a negative impact on the economics of developing the Tribe's mineral resources. In addition, the state taxes divert a substantial portion of the value of the Tribe's mineral resources away from the reservation and into state coffers.

SUMMARY OF ARGUMENT

The United States and the Jicarilla Apache Tribe have imposed comprehensive regulations on Cotton Petroleum's oil and gas operations on the reservation. State taxation of the severance of the tribe's oil and gas is incompatible with the federal and tribal interests reflected in those regulations. The state court of appeals did not consider or evaluate the preemptive effect of the federal and tribal regulations. Neither did the state court identify any regulatory function performed by the state that may justify some level of taxation of the severance of the tribe's minerals. The state disregarded the opinions of this Court requiring a particularized inquiry into the respective governmental interests of the United States, the tribe and the state in the development of tribal oil and gas. Instead, the court below permitted state taxation of the tribe's mineral estate simply because it determined the market would bear the burden imposed by the state taxes.

If federal law does not completely preempt state taxation of Cotton, then the state taxes must be evaluated under the dormant Indian Commerce Clause, not the Interstate Commerce Clause. In this analysis, an Indian tribe cannot be treated as if it were a state without ignoring the unique jurisdictional and historical position of the tribes. This Court should develop a body of law under the Indian Commerce Clause that recognizes the unique status of the tribes and will prevent discrimination against and undue burdens on Indian Commerce, by requiring the state to give a credit in the amount of comparable taxes paid to the tribe.

ARGUMENT

POINT ONE

The New Mexico Taxes On Severance Of Tribal Oil and Gas Are Preempted By Federal Law Notwithstanding The Failure Of The State Court To Find Any Negative Impact On Mineral Production Or On Tribal Revenues

Introduction

The Jicarilla Apache Tribe opposed Cotton's request for plenary consideration of this appeal because Cotton did not pursue the federal preemption theory below as an independent basis for its challenge of the state taxes. Given that litigation strategy, the court of appeals did not conduct a thorough analysis of the federal, tribal, or state interests at stake in this litigation. In the court of appeals Cotton relegated the preemption doctrine to a mere "backdrop" for consideration of its Commerce Clause theory. The state court responded to this approach by making a superficial and incomplete analysis of the factors governing the preemption doctrine. If the Court finds that Cotton has properly raised the preemption issue here, the Jicarilla Apache Tribe offers this section of its brief to demonstrate that the court of appeals did not adequately address the issues governing a federal preemption claim in this context.

1. The preemption analysis requires a detailed evaluation of the governmental interests of the United States, the tribe and the state. Comprehensive federal and tribal regulation of non-Indian activity on the reservation results in preemption of state taxation unless the state proves its tax is carefully tailored to support any regulatory functions it performs to further the activity taxed, or to remedy off-reservation impacts from the activity taxed.

State jurisdiction over the activities of non-members of an Indian tribe on the reservation is preempted by federal law "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *California v. Cabazon Band of Mission Indians*, 480 U.S. —, 107 S.Ct. 1083, 1092 (1987). The balancing of interests mandated by this Court "calls for a particularized inquiry into the nature of the state, federal and tribal interests at stake." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Furthermore, the inquiry into competing governmental interests must be guided by the deeply ingrained traditions in federal law which recognize the sovereign status of Indian tribes. These traditional concepts of Indian sovereignty provide a "crucial backdrop [cit. om'd] against which any assertion of State authority must be assessed." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). The balancing of governmental interests must also seek to carry out the firm commitment of the tribes and the federal government to the goal of promoting tribal self-government, including Congress' "overriding goal of encouraging tribal self-sufficiency and economic development." *Id.*, U.S. at 334-335. Through numerous statutes,[2] Congress has attempted to strengthen and promote the ability of tribes to manage their territory and natural resources and to undertake economic activity within their reservations that will permit them to function as viable governments. In light of these overriding federal goals, "when a tribe undertakes an enterprise under the authority of federal law, an assertion of State authority must be viewed against any interference with the successful accomplishment of the federal purpose." *Id.*, U.S. at 336.

[2]This Court has previously identified and discussed those statutes in *New Mexico v. Mescalero Apache Tribe, supra,* U.S. at 335 n. 17 and in *California v. Cabazon Band of Mission Indians, supra,* S.Ct. at 1092 n. 19. Congress has not departed from the policies reflected in those statutes since the Court decided those cases. See also, discussion at p. 13 infra.

The Court's prior decisions in this area have also identified the kind of state interests that may justify state taxation of a tribal enterprise[3] on the reservation. "The exercise of State authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity." *New Mexico v. Mescalero Apache Tribe, supra,* U.S. at 336. The state services cited to justify the tax must be related to the particular reservation activity the state seeks to tax. *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 846 n. 10 (1982). Likewise, the tax must be carefully tailored to reflect the extent of the state's legitimate interest. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 164 (1980). The state's general interest in raising revenues is not sufficient to justify a tax on reserva-

[3]The term "tribal enterprise" in this context does not require that the enterprise be *exclusively* tribal. The term simply means that the enterprise generates value on the reservation by activity involving the tribe to a signifcant degree. See, *New Mexico v. Mescalero Apache Tribe, supra,* U.S. at 341, citing, *Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134 (1980).

Prior to enactment of the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 *et seq.*, the *only* mechanism clearly authorized by the 1938 Indian Mineral Leasing Act for an "enterprise" to develop the tribe's oil and gas was to enter into mining leases. Confining the tribe to this single option was later considered by Congress to be "the most serious problem" with the Act. See, H.R. No. 97-746, 4 U.S. Code Cong. & Admin. News 1982, at 3466. Congress therefore corrected this deficiency in the 1938 Act by authorizing tribes in 1982 to develop their oil and gas resources through joint ventures and other more modern devices, as well as through leases. *Id.* (All of Cotton's leases were issued before 1972).

In light of these federal constraints on the tribe's options for developing its oil and gas, the lessor-lessee relationship itself cannot preclude treatment of the mining activity as a tribal enterprise. Oil and gas severance by Cotton pursuant to leases from the tribe constitutes the generation of value on the reservation by activity significantly involving the tribe. Cotton's activity is, therefore, part of a "tribal enterprise" within the meaning of this Court's decisions preempting state tax burdens on tribal enterprises.

tion activity which significantly involves the tribe. *New Mexico v. Mescalero Apache Tribe, supra,* U.S. at 336. On the other hand, if the reservation activity has significant off-reservation effects that require state intervention, the state's regulatory interest will be substantial. *Id.*

Under this balancing of interests analysis, the Court has consistently found state taxes to be preempted when the reservation activity in question is subject to comprehensive regulation by the federal and tribal governments.[4] In none of these cases could the state point to significant regulatory interests sufficient to outweigh the substantial federal and tribal interests reflected in the federal and tribal regulatory schemes. In each case the state's real interest was nothing more than the generalized desire to raise revenues, and the Court dismissed that general interest as insufficient.

The Court's prior decisions make clear that the preemption analysis requires careful consideration of the asserted interests of each government, and that no one factor or claimed interest can be isolated as the basis for a decision to permit or prohibit a particular state tax. Compare the statement of the New Mexico Court of Appeals in this case that "[u]nder this traditional preemption analysis, if the taxes do not impact the Tribe, we need look no further." *Cotton Petroleum v. State of New Mexico,* — N.M. —, 745 P.2d 1170, 1174 (1987), Jurisdictional Statement at App. 10. Rather than evaluate and balance the claimed interests of each government, the court of appeals imposed a burden on Cotton to prove actual economic "impact" on the tribe. In the absence of such

[4]The Court has found preemption based on federal regulation of Indian traders, *Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685 (1965) and *Central Machinery Co. v. Arizona State Tax Commission,* 448 U.S. 160 (1980); federal regulation of tribal timber resources, *White Mountain Apache Tribe v. Bracker, supra;* federal regulation and promotion of independent Indian-controlled schools, *Ramah Navajo School Board v. Bureau of Revenue, supra,* and federal and tribal regulation of fish and game resources on the reservation, *New Mexico v. Mescalero Apache Tribe, supra,* U.S. at 343.

proof, the court refused to identify, much less evaluate, the competing interests of the federal, tribal and state governments in development of the tribe's oil and gas. The state court in effect created a presumption that state taxation is permitted unless tribal revenues are reduced. This Court has never incorporated this mechanical condition into the preemption analysis.

2. Oil and gas development on the reservation is subject to extensive and comprehensive regulation by the federal and tribal governments. The state court of appeals failed to evaluate the preemptive effect of these regulations.

The courts below upheld the imposition of state taxes on a tribal enterprise that is in every relevant respect indistinguishable from the logging activity at issue in *White Mountain Apache Tribe v. Bracker, supra.* The state here seeks to tax the taking of the Jicarilla Apache Tribe's oil and gas from the reservation land itself. These mineral resources are part of the realty comprising the Jicarilla Apache Reservation.[5] The United States holds these minerals in trust for the tribe, and has trust obligations to manage them for the exclusive benefit of the tribe. *See, United States v. Mitchell,* 463 U.S. 206, 219-228 (1983). In these respects, the tribe's oil and gas resources are equivalent to the timber resources at issue in *White Mountain Apache Tribe.* Tribal oil and gas differs from tribal timber in that the former is a non-renewable resource, but the tribe's interests in non-renewable resources must be at least as great as its interest in renewable resources.

[5]This Court has noted in a similar context that a severance tax is in many respects like a real property tax and that removal of the minerals from the soil "depletes the resource base and wealth of the State, thereby diminishing a future source of taxes and economic activity." *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 625 (1981). A state therefore normally has a legitimate interest in taxing mineral severance taking place within its territory. *Id.* Yet, the minerals at issue here are not part of the resource base and wealth of the State of New Mexico. The minerals *in situ* are real property held by the United States in trust for the tribe, and are exempt from taxation by the state. *The New York Indians,* 5 Wall. 761 (1867); *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759 (1985). The state's taxable resource base never included these minerals.

As in *White Mountain Apache Tribe,* the Jicarilla Apache Tribe is economically dependent on the resources the state seeks to tax. Oil and gas revenues provide approximately 69% of the tribe's general operating revenues used to provide essential governmental services to members and non-members of the tribe on the reservation, including oil and gas producers like Cotton. In addition, the proceeds from the tribe's severance tax go into a permanent fund to help support tribal government after the oil and gas are depleted. The oil and gas the state seeks to tax are the very lifeblood of the tribe, now and in the future.

Furthermore, the State of New Mexico, like the State of Arizona in *White Mountain Apache Tribe,* has no power to authorize the activity it seeks to tax. The tribe and the United States have the exclusive power to authorize Cotton to sever the tribe's oil and gas. The New Mexico Court of Appeals did not attempt to explain the source of the state's claimed power to tax the privilege of engaging in activity which only the federal and tribal governments can bestow. *See, Ramah Navajo School Board v. Bureau of Revenue, supra,* U.S. at 845.

The federal regulations governing Cotton's oil and gas operations are at least as comprehensive as the regulations at issue in *White Mountain Apache Tribe.* Every aspect of oil and gas development on the reservation from the first advertisement of a lease sale through the reclamation of reservation lands after production has ceased is subject to comprehensive federal regulations promulgated by the Secretary of the Interior under 25 U.S.C. § 396d.[6] These regulations give the Secretary of the Interior literally daily supervision or control over every stage of oil and gas development on the reservation. Remarkably in

[6]25 CFR Part 216 contains the regulations governing exploration permits, exploration plans, mining plans and reports.

25 CFR Part 211 contains the even more detailed regulations governing the leasing of tribal lands for mining and the actual mining operations from the lease sale through surrender or cancellation of the lease.

light of the *White Mountain Apache Tribe* decision, the court of appeals below did not even mention these extensive regulations.

Oil and gas operations on the reservation are also subject to extensive and detailed regulations promulgated under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701 through 1757. That Act directed the Secretary of the Interior to "establish a comprehensive inspection, collection and fiscal and production accounting and auditing system" for the collection of royalties due to Indian tribes. 30 U.S.C. § 1711(a). The Act further imposed strict duties on the lessees concerning site security and transportation of severed minerals (30 U.S.C. § 1712), production records and reports (30 U.S.C. § 1713), interest on late payments (30 U.S.C. § 1721(a)), and lost or wasted oil or gas (30 U.S.C. § 1756). The Act was expressly intended "to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources." 30 U.S.C. § 1701(b)(4).

In addition to these comprehensive federal regulations, the tribe has imposed its own regulatory scheme, with the approval of the Secretary of the Interior. Title 18, Chapter 1 of the Jicarilla Apache Tribal Code[7] regulates all oil and gas activities on tribal lands. Any person seeking to conduct oil and gas operations on the reservation must obtain an oil and gas operating permit from the Tribal Oil and Gas Administration. § 18-1-3 JATC 1987. Among other requirements, the applicant must provide a surety bond, a description of all proposed operations, and a written commitment to abide by all federal and tribal laws and regulations. § 18-1-4 JATC 1987. The permit is conditioned on compliance with tribal requirements governing financial reporting, site safety, liability insurance coverage, Indian preference in hiring, as well as all applicable federal and tribal laws. § 18-1-5 JATC 1987.

[7]The 1987 compilation of the Jicarilla Apache Tribal Code is published by Equity Publishing Corporation, Library of Congress Catalogue No. 87-81134. Relevant portions of the code are included in the appendix tc this brief.

The operating permit may be suspended or terminated for non-compliance with the tribe's environmental protection ordinance. § 18-1-6(A)(3) JATC 1987. That ordinance requires oil and gas operators to submit to the Tribal Council for review all draft environmental assessments, environmental impact statements and reports required by specified federal laws. § 14-6-3 JATC 1987. In addition, the operator must file a development plan identifying all well locations, drilling schedules, pipeline locations, road locations, and locations of any other surface removal activity. Approval of that development plan by the Tribal Council constitutes an amendment of the underlying lease to incorporate the stipulations of the plan. § 14-6-4(D) JATC 1987. Upon approval of the development plan, the Tribal Council issues a Tribal Environmental Permit establishing such conditions and mitigation measures as the Council deems appropriate. *Id.* Violation of the environmental permit can subject the operator to cease and desist orders, impoundment of vehicles and equipment, a request for Secretarial cancellation of the lease, and civil penalties. §§ 14-3-1 and 14-3-2 JATC 1987.

In addition to these extensive operating regulations, the tribe requires detailed production and sales reports in connection with its oil and gas severance tax and its oil and gas privilege tax. § 11-1-6 and § 11-2-5 JATC 1987.

3. The federal and tribal regulations governing oil and gas development on the reservation leave no room for any additional burdens imposed by the state.

Compliance with the comprehensive statutes and regulations discussed above protects the federal and tribal governments' interests in rational development of the tribe's mineral resources. Compliance also imposes significant costs on the lessees and on the federal and tribal governments which enforce the regulations.[8] Of course,

[8]During the five year period at issue in Cotton's refund claim, the Bureau of Indian Affairs and the Bureau of Land Management incurred $1,206,800 in oil and gas related expenditures on the Jicarilla Apache Reservation. During the same period, the

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state taxes do not defray any of the federal or tribal expenditures.

The two taxes at issue in this case are direct taxes on the production of the tribe's oil and gas,[9] and are necessarily paid out of the proceeds generated by severance of the minerals. Those proceeds must cover all costs of production, including taxes and the costs of complying with government regulations adopted for the benefit of the tribe, and must leave a profit for the lessee sufficient to justify its investment. At the most basic level, the state taxes burden the tribe's ability to maximize its return from its oil and gas by diverting a substantial portion of these proceeds to the state, and by creating disincentives to investment on the reservation. (Trial Transcript 440-441, 500-502.) The substantial additional burden on the severance of the tribe's minerals imposed by state pro-

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tribe spent $736,358 on its own oil and gas administration program. Cotton's Trial Exhibits 6, 11 and 13. During this same period the state spent a total of $89,384 for all services on the reservation even remotely connected to Cotton's oil and gas operations.

[9]The only two taxes Cotton challenged below were the Oil and Gas Severance Tax (§ 7-29-1 *et seq.* NMSA 1978) and the Oil and Gas Emergency School Tax (§ 7-31-1 *et seq.* NMSA 1978).

The severance tax is imposed on taking any oil or gas product from the soil of the state. §§ 7-29-1 and 7-29-4 NMSA 1978. The tax is measured as 3.75% of the gross selling price of oil, less deductions for royalties paid to governmental entities and trucking expenses, and as $.087 per mcf of gas. §§ 7-29-4 NMSA 1978. Revenue from the tax goes to the severance tax bonding fund which finances the issuance of bonds to finance specific projects authorized by the state legislature. §§ 7-29-10 and 7-27-27 NMSA 1978. Projects financed by the fund are primarily capital improvements for state institutions and water resource projects. *Id.*

The "emergency school tax" is imposed on the business of severing oil and gas products in the state. § 7-31-4 NMSA 1978. The tax rate for oil and gas is now 3.15% of the gross selling price less deductions for royalties paid to governmental entities and trucking expenses. §§ 7-31-4 & 5 NMSA 1978. Despite its name, revenue from this tax is not earmarked for schools. Revenue from the tax goes into the state's general fund. § 7-31-13 NMSA 1978.

duction taxes must also be considered by the Secretary and the tribal government in calculating how best to regulate mining without discouraging it. State taxation of mineral production throws an additional, state-controlled factor into this exclusively federal and tribal calculus. For example, the term of the leases is ten years "and as long thereafter as minerals are produced in paying quantities." 25 U.S.C. § 396a. The Secretary must determine whether and how state production taxes affect this standard. The federal and tribal regulatory schemes here are much more detailed and comprehensive than the timber regulations this Court held to preclude state taxation in *White Mountain Apache Tribe, supra,* and leave even less room for state interference through taxation.

4. The court of appeals erroneously believed that the governmental interests of the United States and the tribe vary with changing market conditions for the sale of oil and gas.

The state court of appeals concluded that federal law did not preempt state taxation of tribal oil and gas production because it found no measurable economic "impact" on tribal revenues caused by the taxes. The court's search for a reduction in tribal revenues necessarily converted the federal preemption analysis into a simplistic evaluation of transitory market conditions in the oil and gas industry. Rather than evaluate the federal, tribal and state interests in reservation oil and gas production, the court allowed the state to tax on the sole ground that the market then prevailing would bear the additional burden of dual taxation.[10] The state court's opinion wrongly as-

[10]Prices for oil and gas in New Mexico dropped precipitously after the period covered by Cotton's refund claim (1981-1985). The average wellhead price per million cubic feet (Mcf) of natural gas during 1981 through 1985 was $ 2.57, with an average annual price increase of 8.57%. The average price for 1986 and 1987 was $ 1.79 per Mcf, reflecting an annual price decrease of 19.90%. The same pattern exists for oil produced in New Mexico. The average wellhead price per barrel during 1981 through 1985 was $ 30.21, with an average annual price increase of 3.91%. The average price per barrel in 1986 and 1987 was $ 15.86, reflecting an average annual price decrease of 15.73%. See, Annual Resources Report, 1987 Update, New Mexico Energy, Minerals and Natural Resources Department, Santa Fe, 1987.

sumes that federal and tribal interests in development of the tribe's oil and gas are determined by the market conditions at any given time.

Identification of the federal and tribal interest at stake here must begin with the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a *et seq.*, under which the tribe issued mining leases to Cotton. Congress had three major goals in adopting the 1938 Act: (1) to achieve uniformity of the laws relating to mining leases of tribal lands, (2) to harmonize mineral leasing matters with the Indian Reorganization Act, and (3) to ensure that the Indians receive "the greatest return from their property." *Montana v. Blackfeet Tribe,* 471 U.S. 759, 767 n.5 (1985). The basic purpose of the Act was "to maximize tribal revenues from reservation lands." *Kerr-McGee Corp. v. Navajo Tribe,* 471 U.S. 195, 200 (1985).

The Indian Reorganization Act was a major turning point in recent federal Indian legislation, and has been cited by this Court as one of the foundations of the policy of encouraging tribal self-government and economic self-sufficiency. See e.g., *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 152 (1973). The 1938 Act, by harmonizing mineral leasing with policies established by the Indian Reorganization Act, is therefore an integral part of the federal program of actively promoting the governmental authority of the tribe by increasing the tribe's control over its mineral resources. The 1938 Act was intended to maximize both tribal revenues from, and tribal control over, this valuable asset.

Federal and tribal interests are also reflected in the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450, *et seq.*, the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, *et seq.*, and the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101, *et seq.* Each of these statutes strengthened the tribe's ability to manage its own resources and to develop economically. The federal and tribal interests in achieving these goals transcend the market conditions for selling oil and gas at

any given time. Those interests are not diminished when demand for the tribe's oil and gas is strong.

After briefly acknowledging the 1938 Act (but not the other statutes listed above), the court of appeals found that Cotton had proved no actual interference with the tribe's economic development or sovereignty. The court based this conclusion entirely on the following isolated pieces of evidence: (1) Cotton, not the tribe, paid the taxes, (2) Cotton drilled 12 new wells despite the state tax burden, (3) Cotton's production was not disrupted, (4) Cotton was able to pay the state taxes, and (5) a consultant to the tribe advised the tribal council that it could have imposed a higher level of tax, in addition to the state taxes, than the council decided to impose.

The evidence cited by the court of appeals, even if true, does not establish that the state taxes are compatible with federal and tribal interests. The first factor cited by the court is nothing more than an attempt to revive the legal incidence test this Court expressly rejected in *Ramah Navajo School Board v. Bureau of Revenue, supra,* U.S. at 845 n.8. If the state tax is inconsistent with the full accomplishment of federal and tribal interests, it is irrelevant that the tax falls on Cotton.

The court's reliance on well-drilling, continued production, and Cotton's ability to pay the state taxes assumes that the state is permitted to tax production of the tribe's minerals up to the point at which mineral development is actually disrupted. The court's reliance on an economist's opinion that the tribe itself could have imposed higher taxes than it did (on top of the state taxes) makes a similar assumption that tribal interests are affected only if the combined tribal and state tax burden actually deprives the tribe of revenue by disrupting production.[11] Contrary to the approach of the state court,

[11]The Tribal Council declined to set its tax rate at the highest level the market might bear. From th. fact the state court concluded that the tribe had not been "impacted" by the state taxes. On the contrary, the state taxes placed state-imposed

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this Court has never required, as a prerequisite to preemption, that the state taxes actually disrupt the reservation activity.[12]

This court held in *White Mountain Apache Tribe* that state taxes much smaller in amount than those at issue here undermined the Secretary's ability to carry out his responsibilities under the timber management regulations. For example, state taxes "would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber." *Id.,* U.S. at 150. The Court did not require proof that the state taxes had in fact forced the Secretary to reduce those fees to compensate for the tax burden. It was sufficient that the state taxes added a significant non-federal and non-tribal cost factor into the carefully balanced resource management system established by fed-

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limits on the tribe's ability to maximize its own tax revenue from its mineral resources. If the market would bear a 14% tax burden, then the tribe is entitled to that full amount, not whatever fraction remains after the state takes as much as it wishes. Furthermore, the court's approach suggests that the state taxes would be preempted if the tribe had been willing to set its own tax rates at a level that would reduce production when combined with the state taxes. The court did not attempt to justify the state's power to force the tribe to risk decreased production and decreased revenues in order to establish the economic "impact" demanded by New Mexico.

[12]In *White Mountain Apache Tribe v. Bracker, supra,* the state taxes amounted to less than one percent of the tribe's profits from the timber enterprise. *Id., U.S.* at 159-160. There was no suggestion that this one percent tax burden actually reduced the level of logging on the reservation. Rather, the Court emphasized the comprehensive regulation of timber management by the federal government, and concluded that even this minimal burden on logging tribal timber could not be imposed by the state. Pinetop Logging Company, like Cotton in this case, was "able to pay" the state taxes and continue to do business, but ability to pay the tax is not the issue. The proper question under this Court's decisions is whether *requiring* Pinetop or Cotton to pay state taxes is compatible with the federal and tribal interests in the activity.

eral law. Similarly in this case, it is not necessary to prove, as the court of appeals believed, that the state taxes actually dissuaded the Secretary from requiring additional reclamation efforts at a particular well site, or that the taxes actually dissuaded the Tribal Council from requiring additional environmental protection efforts from Cotton, or that the taxes caused Cotton to refrain from investing an identifiable dollar amount in a specific well on a particular date. It is enough that the tribe's trust estate is being developed pursuant to a comprehensive federal and tribal regulatory scheme and the state taxes impose a very substantial cost on that development.

Under the analysis applied by the court of appeals, preemption depends on the vagaries of supply and demand: the state is free to tax the on-reservation production of the tribe's minerals up to the point at which the tax forces price increases high enough to reduce demand for the minerals produced, or possibly until the producer's return on investment is reduced to the point it invests elsewhere. Until that market-determined point is reached the state is free to tax no matter how comprehensively the mineral production is regulated by the federal and tribal governments, and no matter how trivial the services the state provides to facilitate that production. Furthermore, a state tax that was preempted last year, because of the supply and demand curves then in effect, may be permitted next year if the market conditions change.

This entire approach to preemption is misguided. The particularized inquiry mandated by *White Mountain Apache Tribe* is not an inquiry into transitory market conditions. The inquiry is an analysis of the relative interests of the federal and tribal governments (as reflected in federal statutes, regulations and policies) and of state government (as reflected in the level of state services to the taxed activity and off-reservation impacts from the activity). As shown above, the federal and tribal interests in the development of tribal mineral resources on the reservation are overwhelming. The preemption analysis does not permit a court to ignore those interests merely

because the state tax has not produced an immediate reduction in oil and gas production.[13]

It is undeniable that the state taxes on Cotton create an additional financial burden on the development of the tribe's oil and gas resources, and that the tax thereby places state-imposed limits on the ability of the tribe and the United States to control the production costs of the tribe's minerals. It is also undeniable that the taxes are paid out of the proceeds from the production of those minerals. The isolated bits of evidence cited by the court of appeals as demonstrating an absence of "impact" on the tribe do not detract from these facts.

5. The court of appeals erroneously believed that the state taxes are preempted only if they result in a proven reduction in tribal revenues.

The opinion below affirmed the right of the state to tax mineral severance on the reservation which permanently depletes the most valuable component of the trust property of the tribe simply because the trial court did not find any immediate impact on the tribe's revenues. Even though some of the tax preemption cases previously decided by this Court did involve such an immediate reduction in revenues otherwise available to the tribe, the underlying rationale of those decisions did not turn on that superficial fact.

The Court's leading decisions in this area arose from sales transactions between a non-Indian and the tribe or a member of the tribe.[14] In each of these cases except

[13]This Court's affirmance of *Crow Tribe of Indians v. State of Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 56 U.S.L.W. 3450 (January 12, 1988) (No. 87-343) is not to the contrary. Certainly, when the state tax burden is so severe that production is reduced, federal and tribal interests preempt the taxes. Nonetheless, the prior decisions of this Court have never required proof of this extreme level of interference with the federal and tribal interests. Affirmance of *Crow Tribe* did not supplant the analysis applied in *White Mountain Apache Tribe*.

[14]*Warren Trading Post*, *White Mountain Apache Tribe*, and *Central Machinery Company* involved sales of tangible personal property to the tribe or to a member of the tribe. *Ramah Navajo School Board* involved the sale of construction services to the tribe.

Warren Trading Post the tribe expressly agreed to reimburse the non-Indian business for the amount of the tax. (In *Warren Trading Post* the Court assumed the sales tax at issue would be passed on to the Indian customer of the trader but did not dwell on that issue.) Yet, the tribe's agreement to assume the tax liability of its commercial partner was not the controlling factor. Rather, the Court focused on the federal and tribal interests in trading on the reservation, Indian-controlled education, and economic development of the tribes, all reflected in the elaborate and comprehensive regulatory schemes established by federal law. The controlling factor in each case was the overwhelming predominance of these federal and tribal interests over the general revenue interest of the state.

Thus, in *New Mexico v. Mescalero Apache Tribe, supra*, this Court struck down New Mexico's attempt to tax hunting and fishing by non-Indians on the reservation because the state had no legitimate interest in imposing any financial burden on the tribe's game and fish enterprises which were developed and operated by the tribal and federal governments with no significant contribution from the state. The state taxes were not passed on to the tribe, and there was no evidence that they actually reduced the level of hunting and fishing on the reservation or tribal revenues from sales of its own licenses. It was sufficient that the balancing of governmental interests was strongly in favor of the tribe. Precisely the same situation exists in the State of New Mexico's current attempts to tax the tribe's mineral resources.[15]

[15]While a reduction in tribal revenue or in funds available to the tribe is a relevant fact in the preemption analysis, it is not a litmus test. Where reservation value is not involved, a proven reduction in tribal revenue will not bar state taxation. *Washington v. Confederated Tribes of Colville Reservation, supra*, U.S. at 157-158. Where reservation value is being taxed by the state in the absence of any significant state contribution to that value, the tax is preempted without regard to any proven reduction in tribal revenues. *New Mexico v. Mescalero Apache Tribe, supra*, U.S. at 343.

6. The state court failed to identify or evaluate any claimed interests of the state that might justify burdening the federal and tribal interests in oil and gas development on the reservation.

The court of appeals made no attempt to identify or evaluate any claimed interests of the state that could justify these taxes, in the express belief that the state's claimed interests need not be evaluated until actual interference with the tribe's economic development is proven.[16] The court did not identify any regulatory function or service provided by the state to reservation oil and gas development. Compare, *New Mexico v. Mescalero Apache Tribe, supra*, U.S. at 341-342. In fact, even at the trial court level, the only specific finding on this critical issue was Finding of Fact #17, that the state's Oil Conservation Division[17] "regulates spacing and mechanical integrity of wells located on the Jicarilla Reservation as it does all other wells within the state." Jurisdictional Statement, at App. 16.[18]

Even if the state does, pursuant to federal law, play some role in regulating well spacing on the reservation,

[16]See the opinion of the court of appeals at P.2d 1174, Jurisdictional Statement, at App. 10, and discussion at p.6, supra.

[17]The functions of the New Mexico Oil Conservation Division are governed by §§ 70-2-1 through 38 NMSA 1978. The Division is authorized to regulate well spacing in the state by § 70-2-12(B)(10) NMSA 1978. The New Mexico statute enumerates at least 28 specific powers of the Division in § 70-2-12 NMSA 1978, but the trial court made no finding as to the Division's role in areas other than well spacing and regulating "mechanical integrity" of the wells. In light of the comprehensive federal and tribal regulation of well drilling and maintenance, it is not clear what the trial court meant by the state's role in regulating "mechanical integrity" of wells.

[18]This "factual" finding is misleading at best. The state's role in regulating well spacing on the reservation is governed by a federal requirement that state well spacing programs may be applied to Indian lands only with the approval of the Bureau of Indian Affairs. 43 CFR § 3162.3-1(a) (1986). Wells on Indian lands are further subject to location restrictions promulgated by the Bureau of Indian Affairs. 43 CFR § 3162.3-1(b). No such requirements exist concerning well spacing off the reservation.

the court of appeals did not even attempt to determine the cost to the state of providing that service or whether the challenged state taxes are tailored to meet, but not exceed, that interest. No such showing could have been made. Cotton demonstrated at trial that the total cost to the state for all state-funded services provided to Cotton's reservation operations (including any regulation of well spacing) was $89,384 between 1981 and 1985.[19] During that same period, Cotton paid the state $2,293,953 in taxes from its reservation operations. The state taxes have not been tailored to correspond with the limited regulatory function the trial court was able to identify as being provided by the state.

Given the trivial level of state services to Cotton's oil and gas operations on the reservation, the state relied at trial on services it claimed to have provided Cotton and tribal members off the reservation and on services it claimed to have provided to tribal members on the reservation but having no relation to oil and gas development. The trial court accepted the state's argument as an adequate basis for state taxation on the reservation.[20] The court of appeals never evaluated the state's claimed services because it believed the inquiry was not necessary. Neither court made any attempt to determine whether the oil and gas taxes paid by Cotton which were not challenged

[19]The state did not seriously dispute Cotton's calculation of state expenditures related to Cotton's reservation operations. Instead, the state argued that its expenditures on the reservation for road construction and schools, and its expenditures off the reservation for general governmental services, justify its taxation of oil and gas production on the reservation. The decisions of this Court preclude the state's argument on this point. See, *Ramah Navajo School Board v. Bureau of Revenue, supra*, U.S. at 846 n.10. The only relevant state services are those supporting the on-reservation activity being taxed. *Id.*

[20]See Findings of Fact Nos. 4 and 14 citing state schools and roads off the reservation that benefit employees and independent contractors of Cotton who live off the reservation, and Finding of Fact No. 15 citing unspecified use by tribal members of state services off the reservation.

here[21] and the taxes paid by tribal members for their off-reservation activity adequately compensated the state for any state services.

The trial court found that the state spent approximately $3 million a year for services to the Jicarilla Apache Reservation.[22] In reaching this figure, the only significant on-reservation services the state could identify relate to roads and schools. Even if state expenditures unrelated to oil and gas production were relevant, the

[21]Cotton did not challenge below three of the oil and gas production taxes imposed by the state. These are the Oil and Gas Conservation Tax, §7-30-1 *et seq.* NMSA 1978, the Oil and Gas Ad Valorem Production Tax, §§ 7-32-1 *et seq.* NMSA 1978, and the Oil and Gas Production Equipment Ad Valorem Tax, § 7-34-1 *et seq.* NMSA 1978.

The conservation tax is now .19% of the taxable value of oil and gas products. 93% of the revenues from this tax go to help fund the oil and gas regulatory functions of the state's energy and minerals department. §§ 7-30-4 and 7-30-14 NMSA 1978.

The ad valorem production tax is a property tax imposed at a rate certified annually for each school district in the state. The current rate for the Dulce school district (the only state school on the reservation) is 3.3142%, which is applied to the assessed value of the oil and gas produced. § 7-32-5 NMSA 1978. The effective tax rate is approximately 1.6571% of the sales price of the oil and gas, not accounting for any deductions. The revenue from this tax is distributed among the state, county, municipality and school district in ratios that vary with each district and year to year. § 7-32-14 NMSA 1978. The Dulce district receives approximately 66% of the revenue produced by this tax from within that district; the balance goes to the state and county. This formula yields the Dulce district approximately 1.09% of the sales price of oil and gas produced within the district.

The ad valorem production equipment tax is a property tax imposed on the assessed value of production equipment, at the rate certified for each school district. § 7-34-3 NMSA 1978. The tax rate for the Dulce school district is now 3.3142%. The effective rate in the Dulce district is approximately .29% of the sales price of the oil and gas produced during the prior year. Revenue from this tax is distributed by the same formula as the ad valorem production tax. § 7-34-9 NMSA 1978. The Dulce district therefore receives through this tax approximately .19% of the sales price of oil and gas produced within the district.

[22]See Finding of Fact No. 12. The state's own trial exhibit estimated its expenditures to be $2,379,976 per year. Exh. DD.

dollar figure adopted by the trial court is grossly inflated. The largest single component of the $3 million claimed by the state is $731,000 representing an annualized figure derived from the costs of a project to repair the portion of State Highway 44 lying within reservation boundaries. Identifying this project as a "reservation" project is extremely generous to the state. Highway 44 is approximately 151 miles long and connects two off-reservation, non-Indian communities: Bloomfield and Bernalillo, New Mexico. Approximately 15 miles of the highway cuts across the extreme southwest corner of the Jicarilla Apache Reservation, where virtually no tribal members live. Certainly tribal members use Highway 44, but the cost of these repairs cannot reasonably be described as a service to the reservation as opposed to the entire northwest quadrant of the state. The state also claims credit here for maintaining U.S. Highway 64, which is 110 miles long, connecting the off-reservation, non-Indian communities of Chama and Farmington, New Mexico. The approximately 15 miles of that highway passing through the reservation connect the Jicarilla Apache capitol of Dulce with those off-reservation towns. However, since tribal members must travel to those off-reservation communities to make any major purchase, the benefit from the 15 mile portion of the highway on the reservation flows at least as much to the off-reservation merchants as to the tribal members.[23] Of the three roads cited by the state as "services" to the reservation, only highway 537 lies primarily within the reservation. That road was constructed by the tribe and the Bureau of Indian Affairs, not by the state, and was conveyed to the state for maintenance. The state courts did not attempt to determine how much the state saved by having the tribe and the BIA build highway 537 or how much of the claimed maintenance costs are covered

[23]85% of all purchases by reservation residents are made off the reservation, due to the lack of retail businesses on the reservation. Trial Transcript 107-110, 252-253. These off-reservation purchases yield the state $900,000 a year in gross receipts taxes. *Id.*

by federal highway funds and the motor fuels and other taxes paid by tribal members and non-Indian businesses on the reservation.

Even weaker is the state's argument that its contribution to the public school on the reservation justifies the two challenged production taxes. The state has divided the reservation into three school districts: Dulce #21, Jemez Mountain #53 and Cuba #20.[24] The Dulce district includes the northern section of the reservation, where almost all tribal members live. The only on-reservation public school is in the town of Dulce, within that district. The Jemez Mountain and Cuba districts include Jicarilla Apache lands, but not Jicarilla Apache children. As a result, the tribe's oil and gas resources located in the Jemez Mountain and Cuba districts go to support the off-reservation schools in those districts where no Jicarilla Apache children are educated. The state seeks credit for funds local taxes provide the Dulce district, without reducing that amount by the revenues flowing into the Jemez Mountain and Cuba districts from Jicarilla Apache oil and gas.[25] Furthermore, the only state taxes that even attempt to tie oil and gas production to local education expenses are the ad valorem production tax and the ad valorem production equipment tax.[26] Cotton did not challenge either of these taxes below. Expenditures funded by those taxes cannot justify the taxes being disputed.

More important is the fact that state funding to the Dulce district has systematically short-changed Jicarilla Apache children. Until the 1988 legislative session, state law required that federal funds under P.L. 81-874 (20

[24]The figures discussed below are taken from the official publication of the New Mexico Office of Education, Department of Finance and Administration, entitled *Statistics,* for the 1985-1986 school year, published by the state in December 1986. Excerpts from that publication are included in the appendix to this brief.

[25]In fact, the assessed value of oil and gas property within the Jemez Mountain district is substantially larger than that within the Dulce district ($168,391,289 versus $93,034,653.)

[26]See note 21 *supra.*

U.S.C. §§ 236-244) be applied to substitute for rather than supplement state money for educating Indian children, in violation of 20 U.S.C. § 244a. The state statute reduced state funding to a school district by 95% of the amount of P.L. 81-874 funds received by that district. § 22-8-25(D) NMSA 1978. As a consequence, state funding to the Dulce district for the 1985-1986 school year was approximately one-third of the funding to the comparably sized, neighboring, but non-Indian district of Jemez Mountain, which also reaped the benefit of local property taxes on Jicarilla Apache oil and gas.[27] Per pupil state operating funds for Dulce were $1305, and for Jemez Mountain were $4358. It is ironic that the state should ask this Court to justify taxation of the tribe's oil and gas resources by relying on an educational funding system that overtly discriminated against the tribe's children.

While the state has reduced its funding to the Dulce school district by the amount of federal funds under P.L. 81-874, the Jicarilla Apache Tribe has used its own money to support that state school. When state-imposed caps on the interest rate payable on school bonds rendered them not marketable in 1982, the Tribe purchased the entire issue of bonds by the Dulce district in order to replace temporary school buildings with permanent improvements.

The trial court stretched reason and fairness to the breaking point in order to arrive at the finding of $3 million a year in state-funded services on the reservation. State services to the reservation, rather than to the northwest quadrant of the state, were a fraction of the figure adopted by the trial court. But even as inflated by the trial court, the level of all state taxes derived from the reservation and its residents is grossly in excess of the claimed level of expenditures on the reservation. State

[27]The Dulce district had 592 students and received $772,444 from the state for its operating fund. The Jemez Mountain district had 477 students and received $2,078,703 from the state for its operating fund. The Chama district (off-reservation and non-Indian) had 636 students and received $2,563,647 from the state for its operating fund.

funding of these services is not sufficient to outweigh the federal and tribal interests in oil and gas development on the reservation.[28] The only real interest of the state here is the generalized interest in raising revenue from any source the state can reach. That interest is simply insufficient to outweigh the federal and tribal interests in development of the tribe's trust property.

POINT TWO

The Commerce Clause Does Not Permit Treating Indian Tribes As States For Purposes Of Determining Whether State Taxes On Oil And Gas Production On The Reservation Create A Prohibited Multiple Tax Burden On Indian Commerce.

1. The Indian Commerce Clause, and not the Interstate Commerce Clause, applies to commerce between a state and an Indian tribe.

Analysis of these state taxes under the Commerce Clause, Art. I, § 8, cl. 3., must recognize that the Clause creates three different classes of commerce: Interstate Commerce, Foreign Commerce, and Indian Commerce.[29] The Constitutional Convention considered each of the three classes to be "entirely distinct." *Cherokee Nation v. Georgia*, 30 U.S.(5 Pet.) 1, 17-18 (1831).

The Interstate Commerce and Indian Commerce Clauses were adopted for very different reasons. The central objective of the Interstate Commerce Clause was to create an area of free trade among the several states. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944);

[28]The court of appeals and the trial court also failed to identify any off-reservation effects of Cotton's oil and gas severance. Compare, *New Mexico v. Mescalero Apache Tribe, supra*, U.S. at 342.

[29]The Tribe assumes for purposes of this analysis under the Commerce Clause that state jurisdiction to tax Cotton's severance of oil and gas on the reservation is not wholly barred under the Indian preemption cases exemplified by *White Mountain Apache Tribe v. Bracker, supra* and *Ramah Navajo School Board v. Bureau of Revenue, supra*. Thus, we assume the State of New Mexico has some degree of authority to tax Cotton's severance of the tribe's oil and gas, and the question is whether the Commerce Clause places limits on the state's taxing power.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 350 (1977). Free trade has never been the national government's policy toward Indian Commerce. Quite to the contrary, from the earliest days of the nation the federal government legislated to restrict commerce with the Indian tribes.[30] The Indian Commerce Clause was intended to give the national government exclusive control over trade with the Indian tribes, not to create a free trade zone with the tribes.

2. Doctrines developed by this Court under the Interstate Commerce Clause do not reflect the unique jurisdictional status of Indian tribes and do not adequately protect Indian Commerce from multiple tax burdens imposed by the states.

This Court has previously recognized the serious conceptual difficulties in reviewing tribal action under the Interstate Commerce Clause. See *Merrion v. Jicarilla Apache Tribe, supra*, U.S. at 154. Just as great are the conceptual difficulties in reviewing state action under the Interstate Commerce Clause when those actions affect Indian Commerce. Congressional action affecting Indian tribes is normally taken under the Indian Commerce Clause, not the Interstate Commerce Clause, *Id.* at 156 n. 21, so that any Commerce Clause limitations on state power over Indian Commerce must derive from the Indian Commerce Clause. Furthermore, because tribal boundaries do not necessarily correspond to the boundaries between any two states, commerce between a tribe and a

[30]Congress first placed restrictions on access to Indian Commerce in 1790 with the adoption of the first Trade and Intercourse Act, which prohibited any trade with Indian tribes, except pursuant to a license fro mthe federal government, and required the forfeiture of any goods introduced into Indian country without the required license. Act of July 22, 1790, ch. 33, §§ 1 and 3, 1 Stat. 137, 138. The Trade and Intercourse Act of 1793, Act of March 1, 1793, ch. 19, §§ 1, 3, 6 & 7, 1 Stat. 329, 330, and the Trade and Intercourse Act of 1834, Act of June 30, 1834, ch. 161, 4 Stat. 729, further strengthened those restrictions. Federal licensing of trade with Indian tribes is still required by federal law. 25 U.S.C. §§ 261-264.

state will not necessarily be interstate in character. *Id.* at 158 n. 24.

What this Court has said about the Indian preemption doctrine applies with equal force to the differing purposes and histories of the Interstate and the Indian Commerce Clauses:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other.

White Mountain Apache Tribe v. Bracker, supra, U.S. at 143. It is equally treacherous to import notions of Interstate Commerce to the area of Indian Commerce.

The decision below demonstrates that imposing a body of law arising from taxation by two states onto the tribe-state relationship fails to prevent undue burdens on Indian Commerce. Under the Interstate Commerce Clause, a state has the power to impose an "unapportioned" tax on the severance of minerals within its borders, in the sense that the power to tax is not reduced by the taxing power of any other state. *Commonwealth Edison Co. v. Montana, supra*, U.S. at 618. Multiple taxation cannot arise as an issue because "the severance can occur in no other state". *Id.* This Court has also upheld the right of the Jicarilla Apache Tribe to impose an unapportioned tax on the severance of minerals within its reservation in part on the same rationale. *Merrion v. Jicarilla Apache Tribe, supra*, U.S. at 159 n. 26. When, as in the case now on appeal, the Tribe's reservation is located within the state seeking to tax, *Commonwealth Edison* and *Merrion* collide to permit multiple taxation of the mineral severance. The Interstate Commerce Clause was not intended to resolve, and does not adequately resolve, the conflicting tax powers of governments with overlapping geographical territories.

3. The Indian Commerce Clause prohibits undue burdens on Indian Commerce by requiring the state to grant a credit against its taxes in the amount of any functionally equivalent tribal taxes.

Rejection of the proposition that Indian tribes should be treated as states does not mean that the Commerce Clause affords Indian Commerce no protection from unduly burdensome state taxation. In *Washington v. Confederated Tribes of Colville Reservation, supra,* the Court rejected the idea that the Indian Commerce Clause "of its own force, automatically" bars state taxation on the reservation. *Id.,* U.S. at 158. The Court noted, however, that the clause "may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce." *Id.*

The severance of tribal oil and gas on the reservation unquestionably constitutes Indian Commerce whose existence does not rest solely on a claimed exemption from state taxation. The state taxes at issue here therefore create a multiple tax burden on the class of Indian Commerce entitled to the protective role described by the Court in *Colville.*[31]

The proper scope of the dormant Indian Commerce Clause is suggested by this Court's decisions under the Foreign Commerce Clause. This Court has held that the Foreign Commerce Clause raises issues of peculiarly national concern not raised by the Interstate Commerce Clause. *Japan Lines Ltd. v. County of Los Angeles,* 441 U.S. 434, 446-448 (1979). For analogous historical and conceptual reasons, the Indian Commerce Clause raises issues of peculiarly national concern. "With the adoption of the Constitution, Indian relations became the exclusive province of federal law," *County of Oneida, New York v. Oneida Indian Nation,* 470 U.S. 226, 235 (1985). Thus, the Indian Commerce Clause was intended to allow the nation to speak with a single voice as to Indian Commerce, just as it must as to Foreign Commerce. See, *Japan Lines, Ltd. v. County of Los Angeles, supra,* U.S. at 448-450. Similarly, federalism and state sovereignty do not limit Congressional power over Indian affairs or foreign policy. *See, Id.,* at 448 n. 13. Only the federal government has the authority to establish Indian policy for the nation. The state's sovereignty places no limits on the power of Congress under the Indian Commerce Clause to terminate that state's taxing authority over property in furtherance of federal Indian policy. *Board of Commissioners v. Seber,* 318 U.S. 705, 718 (1943). Finally, the overlapping geographical boundaries of the Indian tribes and the states necessarily increase the risk of multiple taxation of Indian Commerce, as this case demonstrates.

[31]In *Ramah Navajo School Board v. Bureau of Revenue, supra* at 846-847, the Court suggested that analysis of state taxation under the dormant Indian Commerce Clause was not necessary because the Indian preemption doctrine adequately protected the federal and tribal interests at stake there (by barring any state tax). The present appeal does raise the dormant Indian Commerce Clause issue if the Court finds that Cotton has abandoned any preemption argument, or that the record fails to prove facts necessary for preemption. In either event, this case squarely raises the extent of protection the dormant Indian Commerce Clause affords Indian Commerce where state taxation is not wholly preempted.

This Court's decision in *Washington v. Confederated Tribes of Colville Reservation, supra,* suggested the appropriate remedy against multiple tax burdens caused by state taxation of reservation value when the state tax is not wholly preempted: a mandatory credit by the state in the amount of the tribal tax. *Id.* at 158-159. In the absence of such a credit, Indian Commerce bears the burden of multiple taxation in a situation in which Interstate Commerce would not.

This analysis under the Indian Commerce Clause supplements the Indian preemption cases to eliminate discriminatory burdens on Indian Commerce not adequately cured by preemption. When state taxation is incompatible with the federal and tribal interests in the activity, the state tax will be wholly preempted, *New Mexico v. Mescalero Apache Tribe, supra,* U.S. at 334, whether or not

the tribe taxes the activity.[32] If state taxes are preempted a tribe can structure its own tax system to encourage economic development on its reservation without fear that state taxes will negate the tribe's development plans. If on the other hand, state taxation is not wholly preempted, the Indian Commerce Clause will preclude the state from taxing to the extent its taxes impose a multiple tax burden on the activity. The Clause will then play its proper role in "preventing undue discrimination against, or burdens on, Indian commerce." *Washington v. Confederated Tribes of Colville Reservation, supra* at 158.

CONCLUSION

The decision of the New Mexico Court of Appeals should be reversed. The two oil and gas production taxes challenged by Cotton Petroleum are preempted by operation of federal law. In the alternative, if the taxes are not wholly preempted, the State of New Mexico should be ordered to give Cotton Petroleum a credit for the amount of production taxes paid to the Jicarilla Apache Tribe.

Dated June, 1988.

Respectfully submitted,

B. Reid Haltom
Wayne H. Bladh
Nordhaus, Haltom, Taylor, Taradash & Frye
500 Marquette, N.W., Suite 1050
Albuquerque, New Mexico 87102
(505) 243-4275
Counsel for Amicus Curiae Jicarilla Apache Tribe

[32]The tribes imposed no taxes on the activity at issue in *White Mountain Apache Tribe v. Bracker, supra, Central Machinery Co. v. Arizona State Tax Commission, supra,* or in *Ramah Navajo School Board v. Bureau of Revenue, supra.*

APPENDIX A

STATE, LOCAL, AND FEDERAL FUNDING TO SELECTED SCHOOL DISTRICTS, 1985/1986

	Dulce #21	Jemez Mountain #53	Chama #19	Cuba #20
Number of Students	592	477	636	702
Total Revenue in Operating Fund	1,801,042	2,223,382	2,642,455	2,795,279
Operating Revenue from Local Property Tax Levy	53,161	96,187	7,424	14,177
Local Property Tax Rate (avg.)	2.43%	1.33%	1.38%	.79%
1985 Oil & Gas Assessed Value	93,034,653	168,391,239	0	11,565,929
1985 Total District Assessed Value	106,481,013	189,665,049	16,406,450	27,996,201
Operating Revenue from State Funds (Total)	772,444	2,078,703	2,563,647	2,229,951
Operating Revenue from State Equalization Payment (§ 22-8-25 NMSA 1978)	639,162	1,458,543	2,242,141	1,619,930
Operating Revenue from Federal Funds (Total)	898,603	18,142	30,987	514,789
Operating Revenue from P.L. 81-874	867,243	3,075	2,093	495,357
Total State Operating Funds per Student	1,305	4,358	4,031	3,177

All data are taken from *Statistics*, issued by the New Mexico Office of Education, Department of Finance and Administration, State of New Mexico, for school year 1985/1986, published December 1986.

APPENDIX B

SELECTED CHAPTERS OF THE JICARILLA APACHE TRIBAL CODE

TITLE 14

ENVIRONMENTAL PROTECTION

Chapter 1. General Provisions.

§ 1. Purpose. The purpose of this Title is to insure that proper and meaningful consideration of environmental, cultural, historical, and ecological factors is made by any person, the BIA or the Tribal Council prior to its approval of activities on the Jicarilla Apache Reservation which may significantly affect that environment in whole or in part.

§ 2. Administration. The Tribal Council shall assign a person or agency to carry out the day-to-day functions under this Title.

§ 3. Effective Date. This Title became effective on April 13, 1984, the date of approval by the Area Director of the Bureau of Indian Affairs, the authorized representative of the Secretary of the Interior. It was enacted by the Jicarilla Apache Tribal Council as Ordinance No. 84-0-235, the "Jicarilla Apache Environmental Protection Ordinance," on January 20, 1984.

§ 4. Repeal. Environmental Protection Ordinance No. 78-0-53, enacted August 15, 1977, is hereby repealed as of the effective date hereof.

§ 5. Business or Operator's Permit. Every person seeking Tribal Council action hereunder shall obtain a Business or Operator's Permit from the Tribe if so required by the Ordinances of the Tribe or federal laws or regulations. Any violation of this Title shall be grounds

for suspension or revocation of a person's Business or Operator's Permit.

§ 6. Definitions.

(A) Activity. Any industrial or commercial development project, any development project involving the disturbance of more than one (1) acre of land surface, any development activity in a part of the Reservation designated environmentally sensitive, or any research project, other than activity connected with oil and gas operations.

(B) Applicant. The person requesting a permit to conduct activities on the Reservation which are regulated by this Title, other than oil and gas activity.

(C) Operator's Permit. An Operator's Permit issued by the Tribe required by the Ordinances of the Tribe.

(D) Council. The elected governing body of the Jicarilla Apache Tribe.

(E) Development project. Any activity which directly or indirectly seeks to develop, use or modify Reservation resources.

(F) Environmentally sensitive area. A part of the Reservation considered by the Council to be so subject to environmental disturbance as to warrant special rules to govern resource development.

(G) Federal regulations. Regulations adopted by an agency of the United States government and published as a part of the *Code of Federal Regulations*.

(H) Non-compliance. Any neglect, failure or refusal to do or perform an act set forth in this Title.

(I) Oil and gas activity. Any activity on tribal lands engaged in pursuant to leases entered into under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g; land subject to development contracts issued pursuant to the Indian Mineral Development Act of 1982, P.L. 97-382, 25 U.S.C. §§ 2101-2108; or activities undertaken solely by the Tribe.

(J) Oil and gas lessee. A person holding rights to explore, develop or operate on tribal lands for oil and gas under a lease issued pursuant to the Indian Mineral Leasing Act of 1938, *supra*, or the Indian Mineral Development Act of 1982, *supra*.

(K) Oil and gas contractor. A contractor with the Tribe under contract negotiated pursuant to the Indian Mineral Development Act of 1982, *supra;* under joint exploration and development contract entered into with the Tribe prior to the effective date of the 1982 Act; or under contract to conduct activities on land operated by the Tribe outside of these Acts.

(L) Permit holder. The holder of a tribal environmental permit issued under this Title, except for oil and gas exploration and development.

(M) Person. Any individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency, or any other legal entity or its legal representatives, agents, or assigns.

(N) Pollutant. Any substance or energy entering the environment as a direct or indirect result of human activity which alters or has the potential to alter the physical, chemical, biological, cultural or aesthetic properties of the environment.

(O) Research project. A project or study conducted to gain knowledge about Reservation resources.

(P) Reservation. The Jicarilla Apache Reservation.

(Q) Reservation environment. The functioning system composed of all living and non-living entities and objects within the boundaries of the Reservation together with their interactions and the inputs to and outputs of that system.

(R) Reservation resources. The physical and biological resources of the Tribe within the boundaries of the Reservation, including but not limited to land, water, air, minerals, cultural or historical sites and objects, animal and plant life, and aesthetic values.

(S) Secretary. The Secretary of the Interior of the United States of America or his authorized delegate.

(T) State regulations. Regulations formally adopted by an agency of the State of New Mexico.

(U) Superintendent. The Superintendent of the Jicarilla Agency, BIA.

(V) Tribe. The Jicarilla Apache Tribe.

(W) Tribal environmental permit. A permit issued by the Tribe pursuant to this Environmental Protection Title to carry out an action covered by this Title.

(X) Violation. Breach of any right, duty, requirement or provision of this Environmental Protection Title.

Chapter 2. Compliance and Enforcement Procedures.

§ 1. Non-Compliance. Any person who fails to comply with any provision of this Title shall be subject to the

penalties and other protective actions set forth herein. In the event of non-compliance, the person or agency designated by the Council to be responsible for enforcement shall serve the violator, in person or by mail, with a notice of non-compliance which shall specify non-compliance with the provisions of this Title or the terms of the plan of development submitted pursuant to this Title and shall specify the action which must be taken to correct such non-compliance, as well as the time limits within which action shall be taken.

§ 2. Order to Cease Activity. In the event of non-compliance with this Title, with any notice of non-compliance, or with any applicable federal law or regulation, the person or agency designated by the Council to be responsible for enforcement may order the cessation of such activity without additional notice to the violator if the non-compliance is not cured in five (5) calendar days. If deemed necessary, after the five (5) day period of non-compliance, vehicles and equipment may be impounded, or access restricted to an area or site until the non-compliance is cured. The violator shall be served, in the case of violation of this Title, with a statement of the reasons for the cessation order, and the actions needed to be taken before the order will be lifted. A copy of this cessation order and the statement of reasons for the order shall be delivered to the President of the Tribe and to the Superintendent.

§ 3. Enforcement By United States. The Secretary of the Interior, or his authorized delegate, including the Superintendent, Jicarilla Agency, Dulce, New Mexico, along with officials of the Bureau of Land Management,

or agents or employees of these officials, are hereby requested and authorized to enforce the provisions of this Title and take any enforcement action authorized by this Title or federal laws or regulations which do not interfere with action being taken by the Tribe.

Chapter 3. Remedies and Penalties.

§ 1. Remedies. In the event a violator fails to take action in accordance with the notice of non-compliance or cessation order served on him, pursuant hereto, the person or agency in charge of enforcement may continue its cessation actions or impoundment of vehicles and equipment; may request the Secretary to serve notice of intent to cancel the lease or mineral agreement, specifying the basis for notice; may request the Secretary to proceed as provided in the federal regulations, and to assess penalties as provided by these federal regulations; may assess civil penalties as set forth in § 2 herein; and may take any other action deemed appropriate.

§ 2. Civil Penalties. In addition to the penalties provided by federal regulations, the violator shall pay to the Tribe a civil penalty of up to $5,000 per day for each day of such violation or continued violation of an order of non-compliance if such penalties are assessed by the person or agency designated by the Council to be responsible for enforcement of this Title. The person or agency in charge of enforcement shall serve the violator, in person or by mail, with a notice of assessment of penalties which shall be due and payable to the Tribe within twenty (20) days of this notice. Failure to pay any penalties imposed shall be considered an additional violation of this Title.

Chapter 4. Regulations.

§ 1. Regulations. The Council shall establish regulations for the administration of this Title which shall be posted in one (1) or more public places on the Reservation and published in the Jicarilla Apache Chieftain. Such regulations shall provide for a process for Council approval of proposed activities, contact with land assignment holders, and permit issuance.

Chapter 5. Activities Other Than Oil and Gas Operations.

[Omitted]

Chapter 6. Oil and Gas Activities.

§ 1. Purpose. This Chapter is designed to insure that proper consideration of environmental and ecological factors, and long-range planning is given by the Council prior to its approval of oil and gas leasing, contracting or operations on the Reservation. This Chapter shall further insure that all oil and gas operations on the Reservation shall be carried out in an environmentally sound manner, and that a procedure for enforcing such compliance shall be provided.

§ 2. Scope. This Chapter shall be applicable to any person conducting oil and gas operations on the Reservation, including those who bring before the Council for its approval any proposed oil and gas development plan or activity to be performed on the Reservation which may significantly affect the environment of the Jicarilla Apache Reservation. Federal agencies preparing environmental assessments or environmental impact statements pursuant to the National Environmental Policy Act and

regulations issued pursuant to the authority thereof are requested to cooperate in fulfilling the requirements of this Title as well as those of federal laws and regulations. Federal agencies are further requested to designate the Tribe as a cooperating agency whenever such designation is consistent with regulations issued pursuant to the National Environmental Policy Act.

§ 3. Planning. Prior to any operation on lands leased for oil and gas pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, lands subject to development contracts pursuant to the Indian Mineral Development Act of 1982, P.L. 97-382, 25 U.S.C. §§ 2101-2108, or operations conducted solely by the Tribe, the lessee, sublessee, assignee, contractor, subcontractor or operator, or agents or successors thereof, shall comply with applicable provisions of the National Environmental Policy Act 42 U.S.C. §§ 4321-4347, applicable regulations promulgated by the Council on Environmental Quality, 40 C.F.R. 1508.9, Environmental Quality Handbook, 30 BIAM Supp.; National Historic Preservation Act, 16 U.S.C. §§ 470, *et seq.*, and regulations promulgated thereunder, 36 C.F.R. Parts 60, 63 and 800; and the Archeological and Historic Preservation Act, 16 U.S.C. §§ 469a-1, *et seq.* Copies of all draft environmental assessments, environmental impact statements, and reports required under the above statutes and regulations, shall be provided to the Council or the agency or the official delegated by the Tribal Council to review these documents, at least thirty (30) days prior to final review of the documents by the Secretary. A copy of all final environmental assessments, environmental impact statements or other similar requests

shall be filed with the Tribe, regardless of by whom these documents were prepared.

§ 4. Plans Of Development.

(A) In addition to the environmental assessments and studies required by statutes and federal regulations, each lessee, sublessee, assignee, contractor, subcontractor or operator, or agents or successors thereof, as the case may be, shall file with the Tribe, with a copy to the Superintendent, a plan of development which shall indicate well locations, drilling schedule, pipeline locations, road locations and locations of other surface removal activity which shall be coordinated with development of adjacent tracts so that duplication of roads, pipelines and other clearing will be avoided. The Tribe may require that lessees, sublessees, assignees, contractors, subcontractors, interest holders or operators, or agents or successors thereof, holding leases or contracts adjacent to lands being developed be required to plan road, pipeline and other clearing in conjunction with plans for development presented to the Council in accordance with this paragraph whether or not such persons or entities intend immediate development.

(B) It is an objective of this Chapter that lessees, sublessees, assignees, contractors, subcontractors, operators, or agents or successors thereof, and others holding leases or contracts for oil and gas development on the Reservation, or interests therein or rights thereto, develop the properties which they hold diligently and in accordance with approved drilling schedules.

(C) The lessee or contractor, or any other person submitting a development plan, may be required to appear

before the Council or any other person or agency designated by the Council to review the plan of development required by this Section.

(D) The plan of development to be submitted under § 4(A) above shall, when approved by the Council, be considered as an additional stipulation of the lease or contract involved, and the lessee, sublessee, assignee, contractor, subcontractor or operator, or agents or successors thereof, shall comply with the conditions thereof unless waived by the Council. Upon approval of the plan or proposed activity, the Council shall authorize issuance of a Tribal Environmental Permit with such conditions and mitigation measures as the Council deems appropriate. The permit holder shall be subject to all provisions of this Title, including enforcement.

Chapter 7. Appeals.

§ 1. Appeals. Any person aggrieved by any action taken by a tribal official or person or agency designated by the Council to be responsible for enforcement of this Title, may appeal to the Council. An appeal shall not stay any order to cease activity, impound vehicles or equipment and/or restrict access to the site of any operation, or pay penalties unless a stay is granted by the Council.

(A) Any penalties paid by a person in violation of an order of non-compliance may be rebated by order of the Tribal Council upon hearing an appeal taken under this Section.

(B) The Tribal Council may affirm or reverse any decision of a tribal official or person or agency designated to be responsible for enforcement of this Title, or issue

such other orders or take such action as it deems appropriate.

(C) The Tribal Council may allow such presentations, evidence or arguments as it deems appropriate.

(D) A decision of the Tribal Council shall be final.

Chapter 8. Severability.

If any part or application of this Title is held invalid, the remainder of the Title, or its application to other situations or persons, shall not be affected.

TITLE 18

BUSINESS

Chapter 1. Oil and Gas Operating Permits.

§ 1. Definitions. For purposes of this Chapter, the following definitions shall apply:

(A) Oil and gas operation. Any activity on tribal lands engaged in pursuant to leases entered into under the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, or land subject to development contracts issued or approved pursuant to the Indian Mineral Development Act of 1982, P.L. 97-382, 25 U.S.C. §§ 2101-2108, or activities undertaken solely by the Tribe.

(B) Applicant. The person requesting a permit to conduct oil and gas operations on the Reservation which are regulated by this Chapter.

(C) Oil and Gas Operating Permit. A permit issued by the Tribal Council as required by this Chapter.

(D) Council. The elected governing body of the Jicarilla Apache Tribe.

(E) Federal regulations. The regulations adopted by an agency of the United States government and published as a part of the *Code of Federal Regulations*.

(F) Resources Committee of the Jicarilla Apache Tribe or its successor.

(G) Non-compliance. Any neglect, failure or refusal to perform an act set forth in this Chapter.

(H) Oil and Gas Administration. The Oil and Gas Administration of the Jicarilla Apache Tribe or its successor, referred to as the OGA.

(I) Permit Holder. The holder of an Oil and Gas Operating Permit issued under this Chapter.

(J) Person. Any individual, partnership, firm, company, public or private corporation, association, trust, estate, political subdivision or agency, or any other legal entity or its legal representatives, agents or assigns.

(K) Reservation. The Jicarilla Apache Reservation.

(L) State regulations. Regulations formally adopted by an agency of the State of New Mexico.

(M) Tribe. The Jicarilla Apache Indian Tribe.

(N) Violation. Breach of any right, duty, requirement or provision of this Chapter.

§ 2. Conformity With The Laws And Regulations Of The Federal Government.

(A) All applications for Oil and Gas Operating Permits and the issuance of Oil and Gas Operating Permits by the Tribe shall be in conformity with the applicable laws, rules, regulations, and guidelines of the federal government.

(B) By enactment of this Chapter, the governing body of the Tribe confers regulatory jurisdiction for the issuance of Oil and Gas Operating Permits on the Oil and Gas Administration of the Jicarilla Apache Tribe, or such other tribal agency or person as the Council may authorize. The regulatory jurisdiction conferred by this Chapter is concurrent with and in addition to the regulatory jurisdiction of the federal government.

§ 3. Tribal Oil And Gas Operating Permit Required. No person performing as an operator, contractor, sub-

contractor, lessee, sublessee, assignee, or in a similar capacity shall engage in or conduct, any oil and gas operations within the boundaries of the Jicarilla Apache Reservation unless an Oil and Gas Operating Permit has been obtained from the Oil and Gas Administration, or the tribal agency or person appointed by the Council to issue such permits.

§ 4. Application For Tribal Oil And Gas Operating Permits. Every person applying for an oil and gas operating permit shall submit the following to the Oil and Gas Administration or person or agency appointed by the Council to accept applications;

(A) A copy of the completed Application for Permit submitted to the Oil and Gas Administration or agency or person designated by the Council to accept applications. Any application for renewal shall include a copy of the Permit issued by the Oil and Gas Administration or person or agency appointed to issue such permits.

(B) Satisfactory proof that the Applicant has obtained a bond from an acceptable company authorized to act as surety, for the activities covered by the Permit.

(C) A brief statement of business history or business transactions conducted or engaged in by the Applicant including the locations, types of operations or businesses and business names.

(D) Description and location of the premises where oil and gas operations will be conducted.

(E) A description of the oil and gas operations to be conducted.

(F) If the Applicant is a corporation, a copy of the corporate charter or registration as a foreign corporation

issued by the State of New Mexico; and a copy of the resolution and power of attorney to act on behalf of the corporation. The applicant also must include a statement which describes the applicant's status as a subsidiary corporation or as a parent corporation with a full listing of subsidiary corporations.

(G) An agreement to abide by the laws and regulations of the federal government, the rules and ordinances of the Tribe, and the conditions upon which the Oil and Gas Operating Permit is issued.

(H) Proof of payment or payment of the Oil and Gas Operating Permit Fee set by the Council.

(I) Satisfactory proof that the Applicant is not an employee or agent of the federal government.

§ 5. Conditions Of Permit. Each Oil and Gas Operating Permit shall contain the following conditions:

(A) The Oil and Gas Operating Permit shall be for a term of one (1) year renewable annually upon payment of the annual Permit fee and update of information required to be filed.

(B) An Applicant or Permit Holder shall notify the Tribe of any and all changes in the financial condition or bankruptcy of the Applicant or Permit Holder which would render the Applicant or Permit Holder subject to the bankruptcy laws of a state or the federal government.

(C) All premises covered by the Oil and Gas Operating Permit shall:

(1) Be made and maintained in a safe and clean manner so as to protect the public health and safety.

(2) Be open to inspection by the Council and BIA or any agency or person appointed by the Council to conduct inspections.

(D) Upon request, either oral or written, of the Tribal Council or agency or person designated by the Council, Permit Holders shall make the Oil and Gas Operating Permit, or a copy thereof, available for inspection by the Council or agency or person designated by the Council. If the Permit is retained off the Reservation by the Permit Holder, then, upon receipt of the request, the Permit Holder shall immediately mail or cause to be mailed a copy of the Permit to the Council or the agency or person designated by the Council.

(E) Any person or entity obtaining a Permit under this Chapter shall be required to maintain such adequate insurance or bonding as found necessary by the Council to protect the people and property within the exterior boundaries of the Reservation.

(F) All oil and gas operations shall conform to the applicable ordinances of the Tribe and laws of the federal government.

(G) All oil and gas operations shall be conducted so as to give preference to Indians in employment as is required by any oil and gas leases or other contract provision or federal law.

(H) An Oil and Gas Operating Permit issued pursuant to this Chapter is nontransferable.

(I) The initial fee required by this Chapter shall be One Hundred Dollars ($100.00).

§ 6. Suspension Or Cancellation Of Permit.

(A) An Oil and Gas Operating Permit issued pursuant to this Chapter may be suspended, cancelled or not renewed upon the occurrence of any of the following.

(1) Filing an Application for Permit which contains incomplete or false statements.

(2) Non-payment of the Tribal Oil and Gas Operating Permit Fee, or nonpayment of any applicable Tribal taxes.

(3) Non-compliance with or violation of Title 14, entitled "Environmental Protection," of this Tribal Code.

(4) Upon a satisfactory showing of other cause why the permit should be suspended or cancelled, including, but not limited to, failure of the Permit Holder to comply with the Conditions of Permit contained in this Chapter.

(B) Any person found by the Council or a person or agency authorized by the Council to administer or enforce this Chapter, to be in non-compliance with the terms of this Chapter during the term of a permit shall be issued a notice of permit suspension and non-compliance by such Council, person or agency.

(C) If notice of suspension is given for any cause, a hearing shall be held by the Natural Resources Committee of the Tribe or successor entity upon request of the Permit Holder to determine if this Chapter has been violated and if sufficient cause exists for imposition of a civil penalty or cancellation. In the event a violation is found, the Natural Resources Committee may impose a civil penalty or order cancellation of a permit. If no hearing is requested, or the violation not cured or a civil penalty not paid following a hearing wherein the suspension is

continued, the permit may be cancelled or a civil penalty imposed at any time after the thirtieth (30) day after the date of the notice of suspension or may be cancelled or a civil penalty imposed after the lapse of the period allowed to cure the violation on the date set at the hearing.

§ 7. Enforcement.

(A) Any person found to be in violation of this Chapter by reason of conducting oil and gas operations without having obtained a Tribal Oil and Gas Operating Permit must immediately cease all oil and gas operations until a Permit is obtained. Conducting oil and gas operations without an Operating Permit may result in the imposition of a civil penalty by the Natural Resources Committee or successor agency, not to exceed Five Thousand Dollars ($5,000.00) for every day of such unauthorized operations. Any persons operating without an Operating Permit shall be served, in person or by mail, with a notice of penalty assessment which shall be paid to the Tribe within twenty (20) days of receipt of such notice unless a hearing before the Natural Resources Committee is requested, in which case such assessment shall be stayed automatically until the Natural Resources Committee determines whether or not the penalty assessment was proper. The Natural Resources Committee may, in addition to assessment of penalties, take action to authorize the impoundment of vehicles or equipment and/or restrict access to the site of any operation until such time as a Tribal Operating Permit is obtained.

(B) Any person or entity found to be in violation of this Chapter by any reason other than operating without having first obtained a Tribal Oil and Gas Operating

Permit, may result in the imposition of a civil penalty by the Natural Resources Committee, not to exceed Five Thousand Dollars ($5,000.00) for every day of such improper operations. The Natural Resources Committee when assessing such a penalty shall serve, in person or by mail, the violator with a notice of penalty of such assessment which shall be paid to the Tribe within twenty (20) days of the receipt of such notice unless a hearing before the Natural Resources Committee is requested, in which case such penalty assessment shall be stayed automatically until the Natural Resources Committee determines whether the penalty assessment was proper. If the penalty is determined by the Committee to have been proper then payment shall be due within twenty (20) days of the date of the Committee decision. The Natural Resources Committee may, in addition to its assessment of penalties, take action to authorize the impoundment of vehicles or equipment and/or restrict access to the site of any operation until such time as the violation stated in the penalty assessment is cured and such person is, in all respects, in full compliance with the Tribal Oil and Gas Operating Permit.

(C) The Jicarilla Apache Police Department is authorized to enforce any order of the Natural Resources Committee or Tribal Council to impound vehicles or equipment and/or restrict access to any site.

§ 8. Appeals. Any person aggrieved by any action taken by a tribal official or the Natural Resources Committee pursuant to this Chapter, may appeal to the Tribal Council. An appeal shall not stay any order to cease activity, impound vehicles or equipment and/or restrict

access to the site of any operation, or pay penalties unless a stay is granted by the Tribal Council.

(A) Any penalties paid by a person in violation of an order on non-compliance may be rebated by order of the Tribal Council upon hearing an appeal taken under this Section.

(B) The Tribal Council may affirm or reverse the decision of the Natural Resources Committee or issue such other orders to take such action as it deems appropriate.

(C) The Tribal Council may allow such presentations, evidence or arguments as it deems appropriate.

(D) A decision of the Tribal Council shall be final.

§ 9. Savings Clause. If any part or section of this Chapter is construed by a court of competent jurisdiction to be in violation of the Constitution of the Jicarilla Apache Tribe or of the United States, then that part or section shall be stricken and the remainder of this Chapter shall continue in full force and effect.

AMICUS CURIAE

BRIEF

(16)

No. 87-1327

In The
Supreme Court of the United States
October Term, 1988

Cotton Petroleum Corporation, *et al.*,
Appellants,

v.

State of New Mexico, *et al.*,
Appellees.

On Appeal from the Court of Appeals of New Mexico

AMICI CURIAE BRIEF OF SAN JUAN COUNTY, DUCHESNE COUNTY, AND UINTAH COUNTY, UTAH, AND THE BOARDS OF EDUCATION OF SAN JUAN COUNTY SCHOOL DISTRICT, DUCHESNE COUNTY SCHOOL DISTRICT AND UINTAH COUNTY SCHOOL DISTRICT

L. Robert Anderson
Lyle Robert Anderson *
Anderson & Anderson, P.C.
P.O. Box 275
Monticello, Utah 84535
Telephone (801) 587-2222

Alvin G. Nash
Uintah County Attorney
152 East 100 North
Vernal, Utah 84078
Telephone (801) 781-0770

Craig C. Halls
San Juan County Attorney
P.O. Box 850
Monticello, Utah 84535
Telephone (801) 587-2231

Herbert W. Gillespie
Duchesne County Attorney
45 East 100 North
Duchesne, Utah 84066
Telephone (801) 738-2683

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

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San Juan County, Duchesne County and Uintah County, Utah (the "Utah Counties"), and the Board of Education of San Juan County School District, Duchesne County School District and Uintah County School District (the "Utah School Districts") (collectively the "Utah Local Governments") respectfully submit this brief as *amici curiae*, in support of the position of Appellees in this case.

INTEREST OF *AMICI CURIAE*

San Juan County is located in the southeastern corner of the State of Utah. San Juan County School District is the Utah public school district within San Juan County. The southern portion of San Juan County lies within the Navajo Indian Reservation (the "Utah Navajo Strip"). Navajos serve on the county commission and on the board of education.

Navajos constituted 46% of San Juan County population in 1980.[1] During the 1986-87 school year, Indian students accounted for 49%, and Reservation Navajos accounted for 40%, of San Juan County School District enrollment.

Duchesne County and Uintah County are located in Northwestern Utah. The Duchesne County School District and the Uintah County School District are the Utah public school districts in those counties. Virtually all of Duchesne County and a large portion of Western Uintah County are within the boundaries of the Uintah Ouray Ute Indian Reservation. Most of the land and the vast majority of the population of the Uintah Ouray Ute Indian Reservation is non-Indian. There is substantial oil and gas production within the Uintah-Ouray Reservation and Duchesne and Uintah counties. Ute Indians attend public schools of the Duchesne and Uintah County School Districts.

The Utah Local Governments depend on property tax revenue, supplemented by state aid, to fund their operations. In 1987 a property tax levy in San Juan County of 1.15% of property value[2] was dedicated two-thirds to the San Juan County School District, and one-third to San Juan County purposes. Since 1978, revenues from

[1] This according to the 1980 Census. The 1990 Census may show San Juan County to be predominantly Navajo.

[2] The property tax is about 3% to 3.5% of production, or about 50 cents per barrel of oil.

property taxes assessed on property owned by non-Indians within the Utah Navajo Strip have accounted for 47% of total property tax revenue to the county and the district. Most of the property tax is assessed on oil and gas properties of *amici curiae* Texaco, Inc., *et al.*, in the Greater Aneth oil fields.[3] Approximately 100 students in the district are dependents of Navajo employees of Texaco, Inc., *et al.*

The San Juan County School District has constructed and operates three elementary schools and two secondary schools within or immediately adjacent to the Utah Navajo Strip.[4] Elementary, middle and secondary schools in Blanding, Utah, also have significant Navajo student populations. The Bureau of Indian Affairs operates two schools within the Utah Navajo Strip, a boarding school at Aneth, Utah,[5] and an elementary school at Navajo Mountain.[6]

[3] The Greater Aneth oil field was discovered in 1956 by Texaco's predecessor, the Texas Company. The field was spaced in 1960 after an extensive hearing before the Utah Oil and Gas Conservation Commission (the "UOGCC"), which has been held up as an example of how spacing should be regulated. Clyde and Dewsnup, *The Aneth Spacing Order: A Case Study of Administrative Regulation*, 7 Utah L. Rev. 16 (1960). In 1960 four different units were formed by the oil companies, the BIA and the Navajo Tribe, with the approval of the UOGCC. Those unit agreements required Texaco, *et al.* to comply with Utah oil and gas conservation regulations. Shortly thereafter, the oil companies commenced secondary waterflood recovery after obtaining, at the Navajo Tribe's suggestion, Utah water rights in the Colorado River drainage rather than Navajo water rights.

[4] The elementary schools are at Montezuma Creek, Bluff and Mexican Hat. The secondary schools are at Montezuma Creek and Monument Valley. An additional elementary school at Monument Valley is in the planning stages.

[5] Most Aneth area residents attend the district's schools at Montezuma Creek. The district and the BIA are currently discussing converting the Aneth BIA School into a public school.

[6] Navajo Mountain, though located within San Juan County, is accessible only by air or by driving for hours through Arizona

The San Juan County School District receives funding from the federal government under Public Law 81-874, as amended,[7] for those students residing within the Utah Navajo Strip. During the 1986-87 school year the district received $1,800 in P.L. 874 money for each such student and expended $4,226.00[8] or more[9] educating that same student. Since July 1, 1977, the district has expended $19.4 million improving, constructing and equipping schools on the Utah Navajo Strip. Federal grants (including P.L. 874 funds) provided $9.4 million. The remaining $10.0 million came from that portion of property taxes (about 22%) designated for school construction, improvement and equipment.

San Juan County provides all of the services within the Utah Navajo Strip that it provides elsewhere in San Juan County, except where services cannot be provided without jurisdiction.[10] Services provided include road construction and maintenance,[11] recreation, fire protection, emergency services, library and bookmobile services, mental health services, preventive health care programs, nursing care, communications, senior citizen centers, elections, and general county government. San Juan County receives no regular federal funding because of its Navajo population.

During the ten years from 1978 through 1987, San Juan County and the San Juan County School District collected approximately $40 million in property taxes from the Utah Navajo Strip. During the same period of time oil companies paid approximately $70 million in Navajo Possessory Interest Taxes.[12] According to a preliminary report produced by an expert witness hired by Texaco, *et al.*, about two-thirds of Reservation related revenue to Utah and its political subdivisions is expended directly on the Navajo Reservation.[13] In contrast, there

across dirt and gravel roads. San Juan County is presently seeking matching federal funds to construct a road to Navajo Mountain.

[7] Federally Impacted Areas Act, 20 U.S.C. Sections 236-244 (1982). Pub. L. 81-874, when fully funded by Congress, provides the district with 62.5% of the national average per pupil expenditure (excluding capital outlays) for each student whose family resides on the Utah Navajo Strip. *See* 20 U.S.C. Sections 238(d)(2)(D) and (d)(3)(B)(i)(II). Parents of Navajo students and the Navajo Tribe must be consulted with respect to the district's educational program, and if not satisfied, may ask the Commissioner to divert the funds to the BIA or to the Tribe for its own schools. 20 U.S.C. Sections 240(b)(3) A, B and C.

[8] *Education Expenditures in Utah—1987*, Report Number 498, Utah Foundation (April 1988). A copy of this report has been lodged with the Clerk of the Court.

[9] The district spends substantially more per student in its Utah Navajo Strip schools than in its other schools.

[10] Even though San Juan County lacks criminal jurisdiction over Navajos within the Utah Navajo Strip, the country's law enforcement officers are cross-deputized with the Navajo Police and provide law enforcement within the Utah Navajo Strip. The county is constructing a police station for *tribal* police in the Aneth-Montezuma Creek area.

[11] San Juan County maintains and improves 550 miles of roads on the Utah Navajo Strip. Since 1978, the BIA has contributed 10% of the cost of maintenance and improvement of those roads. The balance is funded mainly by state gasoline taxes and property taxes.

[12] *Amici curiae* Texaco, *et al.*, have incorrectly stated that they have paid about $50 million in taxes to the Navajo Tribe since 1978. Pleadings and discovery responses on file in *Texaco, Inc. v. San Juan County, et al.* Nos. 4152-53, 4156-57, 4973-77 consolidated (San Juan County, Utah), show that Texaco, *et al.*, have paid over $114 million in tribal taxes since 1978, compared with about $75 million in state and local taxes.

[13] The county and the district believe that the final report will show that, notwithstanding the great wealth of the Greater Aneth oil field and the high oil prices of the late 1970s and early 1980s, Utah and its political subdivisions have spent 80% of all Reservation related revenue, including property taxes, directly on the Navajo Reservation over the last ten years. As the Navajo population grows and the Greater Aneth oil field is depleted, state and local governmental expenditures on the Utah Navajo Strip may well exceed tax revenues derived therefrom.

is no evidence that the Navajo Tribe has expended any substantial amounts on the Utah Navajo Strip from the more than $114 million in tribal taxes and $191 million in tribal royalties collected from the Utah Navajo Strip.

The oil companies producing from the Greater Aneth field paid Utah *ad valorem* property taxes on the value of their production and equipment without protest for 22 years. Neither the county nor the district has attempted to tax the value attributable to the Navajo royalty. Beginning in 1978, when the Navajo Possessory Interest Tax [14] and the Navajo Business Activity Tax [15] were enacted, the oil companies began paying their *ad valorem* property taxes under protest. They challenged both the Navajo and Utah taxes in *Southland Royalty Company* v. *Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983). The Navajo Tribe, as a participant in that litigation, did not challenge any of the Utah taxes, including the *ad valorem* property tax. The oil company challenge to Utah taxes was remanded to state court under 28 U.S.C. Section 1341 because the oil companies, even though lessees of Indian lands, are not federal instrumentalities. Those cases are still pending.[16]

From 1978 to the present, San Juan County and the San Juan County School District have continued to provide services to all San Juan County residents. Voters throughout San Juan County have supported bond elections to construct schools on and off the Utah Navajo Strip and a nursing home serving a substantial Indian population, in reliance on continued property tax revenue from the Utah Navajo Strip. The residents of San Juan County outside the Utah Navajo Strip are now faced with the prospect of refund claims exceeding $40 million, plus

[14] 24 N.T.C. Sections 201-245 (1985 Supp.).

[15] 24 N.T.C. Sections 401-445 (1985 Supp.).

[16] *Texaco, Inc.* v. *San Juan County, et al.*, Nos. 4152-53, 4156-57, 4973-77 consolidated (San Juan County, Utah).

interest, at the same time as the property tax base may be cut almost in half.[17]

Amici curiae Texaco, Inc., *et al.*, mislead the Court with their claim that the cumulative tax burden of Utah and Navajo taxes places them at a distinct commercial disadvantage with respect to competitors who produce oil and gas from adjacent non-tribal lands.[18] *Amici* Texaco, *et al.*, conceded in their litigation with the county and the district the same fact that the New Mexico court found here, *i.e.*, that the *ad valorem* property tax does not affect their development and operations on the Utah Navajo Strip.[19] They chose instead to rely on the effect that Utah taxes have on possessory interest values calculated for purposes of the Navajo Possessory Interest Tax.[20]

[17] San Juan County and the San Juan County School District estimate that it would require a levy of 18% of value on off-Reservation property to satisfy the claims. In other words, the owner of a $50,000 home would be required to pay a one-time tax of $9,000 to keep his home.

[18] The difference between taxes on and off Indian Reservations is not the state tax, but rather the tribal tax. State taxes are actually less on Reservations because of the Indian royalty exemption.

[19] "Their contention, for the purpose of this litigation, as stated, is that the plaintiffs' development and operational decisions are not affected by the state and local tax burden and that they intend to show, separate and apart from the effect of state and local taxes on plaintiffs' operations, production or profits, that state and local taxes directly impact the Tribe by reducing its tax revenues." Memorandum Decision on Motion to Compel dated November 9, 1987, p. 2, as amended, *Texaco, Inc.* v. *San Juan County, et al.*, *supra*.

[20] The Navajo Tax Commission estimates that all Utah taxes reduce the Navajo Possessory Interest Tax base by 15%. Navajo Tax Commission Hearing, June 10, 1986, p. 24. A copy of this portion of the transcript has been lodged with the Clerk of the Court. In other words, the Navajo Tribe has arguably lost $10.5 million (15% of $70 million) in ten years because of *all* Utah taxes, reducing total tax and royalty revenue from $315 million to $305

These *amici* do not agree that the terms of leases of Indian minerals are negatively affected by state taxes. The single dominant consideration for potential lessees of oil and gas rights is the prospect of discovering a reservoir. Recent leases of Indian minerals on the Utah Navajo Strip have generated higher bonus and royalty rates than leases of comparable federal and state lands in the same area.

A comprehensive study comparing Reservation related expenditures with Reservation related revenues has never been done in Duchesne and Uintah Counties. However, Uintah County and the Uintah County School District believe that they spend more tax monies on the Ute Reservation than the Reservation generates in taxes. Duchesne County and the Duchesne County School District must, of necessity, spend all Reservation related revenue on the Reservation, since virtually all of the county is within the Reservation.

The *amici* supporters of appellants would have the Court believe, contrary to the factual findings of the trial court, that Indian Tribes, in cooperation with the federal government, provide all necessary government services within Indian Reservations. Such is certainly not the case on the Utah Navajo Strip or on the Uintah-Ouray Ute Indian Reservation. Every Reservation, every state and every county will present a different fact situation. There are Reservations overwhelmingly populated by non-Indians. There are Reservations where the land is overwhelmingly owned by non-Indians. There are counties

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million. At the same time, San Juan County and the San Juan County School District alone have spent more than $25 million in property tax revenue on the Utah Navajo Strip.

At that same hearing, representatives of Texaco, Inc., emphasized that stability of tax rates was more important than the rates themselves, *id.* at 29-31, and that price differences of less than several dollars per barrel made little difference in oil field economics, *id.* at 25-26.

and school districts controlled by Indian voters. Some few tribes, like the Jicarilla Apache, are relatively wealthy. Most are not.

It is virtually impossible to generalize about Indian Tribes and Reservations. However, the increased participation of Indians in state and local political processes and the increased level of state and local governmental services on Reservations is a nation-wide trend, one which Congress has encouraged with the passage of civil and voting rights legislation, and by providing some federal aid for public school districts educating Indian children.[21]

While it may be true that some Indian tribes are making efforts to become economically independent through taxation, and that Indian tribes generally are increasing their efforts to regulate non-Indian conduct within Reservations, the essential infrastructure for economic development, such as education, transportation and social services, is provided primarily by state and local government.[22] Notwithstanding the emergence of tribal courts,

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[21] *See, e.g.*, S. Rep. No. 714, 83rd Cong., 1st Sess. (1953), reprinted in 1953 *U.S. Code Cong. & Ad. News*, p. 2329, "Another major change in Public Law 874 is one designed to authorize payments to local educational agencies with respect to all Indian children attending their schools who reside on tax-exempt Indian or Federal property;" H. Rep. No. 1441, 84th Cong., 1st Sess. (1955), reprinted in 1955 *U.S. Code Cong. & Ad. News*, p. 3089, "This bill . . . makes two changes . . . designed to facilitate the absorption of Indian children into the public schools." *See also* S. Rep. No. 2753, 84th Cong., 2nd Sess. (1956), reprinted in 1956 *U.S. Code Cong. & Ad. News*, p. 4266, "This program has . . . greatly aided the states in their programs of reorganizing school district boundaries to include in organized school districts Federal Indian reservations;" and H. Rep. No. 1814, 89th Cong., 2nd Sess. (1966), reprinted in 1966 *U.S. Code Cong. & Ad. News*, p. 3852, "This committee hopes that, eventually, all Indian children will attend regular public schools."

[22] Expenditures for education, transportation and social services are more than 80% of all spending by the State of Utah. *State Revenue and Expenditures in Utah—1987*, Research Brief No. 88-2,

state courts still provide a forum for resolving disputes among non-Indians. Although state jurisdiction over Tribes and their members, and to a lesser extent, over non-Indians is limited, state and local governments are still sovereign powers even within Reservations. This is particularly evident when a project or program requires funding.

Appellants have abandoned their challenge to the New Mexico property taxes; they now challenge only the New Mexico severance taxes. However, many of the *amici* supporters of appellants ask the Court to adopt tests for state taxes that no tax, federal, state or tribal, can pass. Invalidation of property taxes in particular would be disastrous to local governments in Reservation areas, unfair to other taxpayers in those areas, and harmful to the interests of Indians benefitting from state and local governmental services. Existing federal preemption law, applied properly by the New Mexico courts in this case, is adequate to prevent abuse by state and local government of taxing power within Indian Reservations.

SUMMARY OF ARGUMENT

Whatever the Court's decision with respect to the severance taxes at issue in this case, the validity of *ad valorem* property taxes assessed against non-Indian lessees of Indian minerals is established and should not be disturbed.

1. Federal laws and policies do not pre-empt state taxation of non-Indian oil and gas development within Reservations. Nondiscriminatory taxation by states of non-Indian lessees on Indian Reservations has been permitted since before passage of the 1938 Indian Mineral Leasing Act, 25 U.S.C. § 396 a-g.[23] The power of state

Utah Foundation (January 1988). A copy of this report is lodged with the Clerk of the Court.

[23] *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938) expressly overruling *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922).

and local government to tax non-Indian property within Reservations was confirmed as recently as 1977.[24] *Crow Tribe of Indians* v. *Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, 108 S.Ct. 685 (1988) merely demonstates that state taxes that interfere with the federal policy of promoting development of Indian resources, without a corresponding state interest in taxation, are preempted by federal law. New Mexico's taxes, and those of most other states and local governments, do not fit this category.

2. Indian Tribes cannot be treated as states (or foreign countries) for purposes of apportionment under the Commerce Clause, because Indian Reservations are not extraterritorial to the states and because states and Tribes share governmental power and responsibilities within Indian Reservations.

3. Any evaluation of state taxes on non-Indian property and activity under the Commerce Clause, must take into account all of the services provided by state and local governments within Indian Reservations and permit flexibility in dealing with changing circumstances.

See also Taber v. *Indian Territory Illuminating Oil Co.*, 300 U.S. 1 (1937) and *Indian Territory Illuminating Oil Co.* v. *Board of Equalization*, 288 U.S. 325 (1933).

[24] *Fort Mojave Tribe of Indians* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

ARGUMENT

I. THE POWER OF LOCAL GOVERNMENTS TO TAX THE PROPERTY OF NON-INDIANS IS WELL ESTABLISHED AND SHOULD NOT BE DISTURBED.

Immunity of lessees of Indian minerals from state taxation developed with the intergovernmental immunity doctrine. Indian mineral rights, held in trust by the federal government, were exempt as government property, and their lessees benefitted from immunity as government instrumentalities. This doctrine suffered its first defeat in the Indian area with *Thomas* v. *Gay*, 169 U.S. 264 (1898),[25] when the Supreme Court ruled that the cattle of grazing lessees of Indian lands were taxable. During the succeeding forty years, the doctrine suffered criticism and modification until finally, in 1937, the intergovernmental immunity doctrine, as applied to government lessees, lost all credibility and was abandoned.[26]

Following the 1938 decision in *Helvering* v. *Mountain Producers Corp.* 303 U.S. 376, expressly overruling *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922), which had invalidated state taxes on lessees of Indian minerals, Congress enacted the 1938 Indian Mineral Leasing Act. Failure of Congress to include any provision with respect to state taxation in the Act must be interpreted as approval of the judicial doctrine eliminating immunity for non-Indian lessees. The solicitor general recognized this in *Oklahoma Tax Commission* v. *Texas Company*, 336 U.S. 342 (1949):

> Once it became clear that the cases extending constitutional immunity against taxation to private persons were no longer to be followed, Congress was not required to take affirmative action to remove an immunity from the lessees of Indian lands when that immunity no longer existed, nor was it necessary for it to consent to the imposition of particular taxes against such lessees once the previously existing constitutional barrier was removed.[27]

If there remained any suggestion that Congress must authorize states to tax non-Indian mineral lessees, it was removed by this Court's decision in *Oklahoma Tax Commission* v. *Texas Company*, 336 U.S. 342 (1949):

> The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.[28]

The Court also rejected the "trickle down theory" of economics advanced by appellants and their *amici* supporters, the argument that the power to tax is the power to destroy:

> The *Mountain Producers* case was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, *unjustified by actual interfering or destructive effects* upon the performance of obligations to or work for the government, state or national.

This Court reaffirmed the state of the law with respect to tax immunity of lessees of Indian lands in 1973:

> The intergovernmental immunity doctrine was once much in vogue in a variety of contexts and, with respect to Indian affairs, was consistently held to bar a state tax on the lessees of, or the product or income from, restricted lands of tribes or individual

[25] That decision also expressly disapproved any notion that taxes may not exceed the value of services provided to particular taxpayers. 169 U.S. 264 at 278.

[26] *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937).

[27] Brief for the United States as *Amicus Curiae* at 33.

[28] *Oklahoma Tax Commission* v. *Texas Company*, 336 U.S. 342 at 366 (1949).

[29] *Id.* at 364 (emphasis added).

Indians. The theory was that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; its rise and decline in Indian affairs is described and reflected in *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376 (1938); *Oklahoma Tax Commission* v. *Texas Company*, 336 U.S. 342 (1949), where the Court cut to the bone the proposition that restricted Indian lands and the proceeds from them were—as a matter of constitutional law—automatically exempt from state taxation. Rather, the Court held that *Congress has the power "to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action"* and that "[t]he question whether immunity shall be extended in situations like these is essentially legislative in character." [30]

The validity of state and local property taxes whose legal incidence and primary economic burden falls on non-Indians has long been settled.[31]

Appellants, and the *amici* who support them, ignore this clear precedent. They argue a federal preemption theory based on *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685 (1965) and its progeny.

In 1965, a trader on the Navajo Indian Reservation challenged the gross proceeds tax on sales to Indians within the Reservation.[32] The Court stated:

[30] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973) (citation omitted).

[31] *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). *Aqua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). *See also Mescalero Apache Tribe* v. *O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

[32] Application of the tax to sales to non-Indians was not challenged. 380 U.S. 685 at 686, n.1.

This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against price deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the state with no duties or responsibilities respecting the reservation Indians,[33] we cannot believe that Congress intended to leave to the state the privilege of levying this tax.[34]

Warren Trading Post was followed by *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), invalidating Arizona motor carrier license and fuel use taxes imposed on a non-Indian logging company operating entirely on the Apache Reservation and entirely on BIA roads. Then, in *Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832 (1982), the Court invalidated New Mexico's gross receipts tax as applied to a non-Indian contracting to build an Indian school on the Reservation after the State of New Mexico had abandoned the school.[35]

[33] Of all pronouncements of the U.S. Supreme Court in this area, the statement that "federal legislation has left the State with no duties or obligations respecting the reservation Indians" has caused states and local government the most consternation. If the Utah Local Governments truly have no responsibility toward any Reservation residents or businesses and if the Court can resolve the problem of Reservations where non-Indians are the large majority of the population and most land is non-Indian owned, it may be proper to invalidate the taxes that fund those services. If not, those taxes must be upheld if the Utah Local Governments are to fulfill their obligations to Reservation residents.

[34] 380 U.S. 685 at 691 (1965).

[35] In that regard, the Court stated that "[t]his case would be different if the State were actively seeking tax revenues for the purpose of constructing or assisting in the effort to provide, educational facilities for Ramah Navajo children. 458 U.S. 832 at 843, n.7.

The thread connecting *Warren Trading Post, White Mountain Apache Tribe* and *Ramah Navajo School Board* is that in every case the cost of the state tax was passed directly back to the Indian Tribe or its members and the tax revenue was not used to provide any services on the Reservation. The taxes in *Warren Trading Post* and *Ramah Navajo School Board* are economically indistinguishable from sales taxes imposed directly on the Indian Tribe or its members. The decision in *White Mountain Apache* clearly rested on the fact that the taxes in question, though earmarked for roads, had not been used on any road used by the contractor. In each of these cases the effect on the Indian Tribe was direct, equal to the amount of the tax, and necessarily followed the application of the tax.

These cases, involving as they do different kinds of taxes, different economic circumstances and different service patterns than are present here, constitute insufficient justification to upset the reliance of state and local government over the last four decades on *Oklahoma Tax Commission* v. *Texas Company*, and overrule the well-established doctrine that non-Indian lessees of Indian minerals are subject to non-discriminatory state taxes.

The reliance of appellants and their supporters on *Crow Tribe of Indians* v. *Montana*, 819 F.2d 895 (9th Cir. 1987) *aff'd mem.* 108 S.Ct. 695 (1988), is misplaced. *Crow Tribe* demonstrates only that state taxes that interfere with development of tribal resources are preempted unless justified by a legitimate state interest. The taxes in *Crow Tribe* were excessive,[36] and were intended to and actually did restrict Crow coal production.[37] As a consequence of the Montana taxes, the Crow Tribe may have lost royalties exceeding the Montana taxes collected.[38] Montana did not attempt to show that it had used any of the tax revenue for services to the coal company, its employees, or to members of the Crow Tribe. In contrast, New Mexico has shown that its taxes do fund necessary government services on the Jicarilla Apache Reservation[39] and that there is no discernible negative impact on development and production of Jicarilla oil and gas.[40] The New Mexico taxes are not out of line with those charged in other jurisdictions. Perhaps the most important distinction between *Crow Tribe* and the instant case is that the excessive Montana taxes increased product price leading to decreased market share. At most, New Mexico's taxes do nothing but reduce Cotton Petroleum Corporation's profits.[41]

The suggestion that regulation of operations under the Indian Mineral Leasing Act of 1938, 25 U.S.C. Sections

[36] The Montana taxes totalled 32.9% of production. 819 F.2d 895 at 899, n.2.

[37] Crow market share fell from 7.4% to 2.78%. 819 F.2d 899.

[38] 819 F.2d at 900.

[39] New Mexico's per capita expenditures on Jicarilla Apaches are higher than the state average. Finding of fact 13.

[40] This finding is consistent with what the Department of Interior has known for years.

"[I]t seems a safe conclusion that the lessee's tax status has little, if any, effect on the Indian Royalty owners." Brief for the United States as *Amicus Curiae* at 38, in *Oklahoma Tax Commission* v. *Texas Company*, 336 U.S. 342 (1949).

"[I]t seems most unlikely that the typical lessee would substantially reduce the terms he offers the government lessor if he knew that his net income would be subject to taxation. His decisions are shaped by geologic rather than cost accounting estimates." Brief for the Petitioner at 38, in *Helvering* v. *Mountain Producers*, 303 U.S. 376 (1938).

[41] Appellants and their *amici* supporters refer to Cotton Petroleum Corporation and other oil companies who lease Indian minerals as "business partners" of the Tribes. Such a disingenuous distortion cannot go unanswered. These lessees typically pay a share of gross production to the tribal lessors. They do not share profits as partners would. State taxes can affect tribal revenue only by discouraging production. Neither New Mexico nor Utah taxes have that effect.

396a to g (1982), is so comprehensive as to preempt state taxes is absurd. Operations under Indian leases are regulated by the Bureau of Land Management under 43 C.F.R. Part 3160,[42] the same regulations that govern federal leases. The BLM regulates as owner of the minerals, or on its behalf, and not as sovereign. BLM regulations do not control what oil companies do with their share of production or their profits. If every activity that is regulated as heavily as the BLM regulates oil and gas production were exempt from state taxes, virtually no state tax would survive.

II. INDIAN TRIBES ARE NOT STATES OR FOREIGN COUNTRIES AND SHOULD NOT BE SO TREATED FOR PURPOSES OF APPORTIONMENT UNDER THE COMMERCE CLAUSE.

No one would seriously contend today that the Jicarilla Apache Reservation is not located within the State of New Mexico, that the Uintah Ouray Ute Reservation is not within Utah, that the Navajo Indian Reservation is not located within the States of Utah, Arizona and New Mexico or that any of the Reservations are outside of the United States. Residents of those Reservations are citizens of the United States and the states in which they live, with the right to participate in elections, with access to elementary, secondary and higher education, and the right to receive all other services which the states provide.[43] This Court has placed limitations on the jurisdiction of states over the activities of Tribes and their members within Reservations, but has never suggested that Reservations are extra-territorial to the states, or that they constitute foreign countries.

During this century the relationship of Indians with the United States and individual states has continually

[42] BLM Regulations incorporate spacing orders and field rules established by state boards or commissions. 43 C.F.R. Section 3162.3-1(a).

[43] United States Constitution, amend. XIV, Section 1.

evolved. While Indians initially received little educational opportunity, and later attended special BIA schools, 90% of Indian students are now educated in public (state) schools.[44] Indians, who were not citizens until 1924, now participate in state and local politics and redistricting has placed many Indians in responsible state and local elective offices. As citizens of the states where they reside, Indians legitimately demand the same services provided elsewhere in their states. With passage of civil rights legislation and more rigorous enforcement of the equal protection clause of the 14th Amendment to the U. S. Constitution, these services have become more available. Because of the depressed economic condition of most Indian reservations and the cultural and language barriers Indians face, the needs of Indians are almost always greater, and the burden on state and local coffers correspondingly increased. While it is true that in some circumstances the federal government provides additional funding where Indians are involved, the federal funding never covers the full cost.[45]

Prior rulings of this Court have already stripped the states of power to tax tribal property,[46] real[47] and personal property[48] of Indians within Reservations, sales to Indians on Reservations[49] and income of Reservation In-

[44] Bureau of Indian Affairs, Department of Interior, *Report on BIA Education: Excellence in Indian Education Through the Effective School Process at* 35 (Final Review Draft, March 1988).

[45] *See e.g.*, with respect to Impact Aid or P.L. 81-874 payments to school districts, H. Rep. No. 98-748, 98th Cong., 2nd Sess. p. 13 (1984), reprinted in 1984 *U.S. Code Cong. & Ad. News*, p. 4048:

> Neither "A" nor "B" funding comes close to covering the full, actual cost of education for these students.

[46] *Kansas Indians*, 72 U.S. (5 Wall.) 737 (1967).

[47] *McCurdy* v. *United States*, 264 U.S. 484 (1924).

[48] *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

[49] *Warren Trading Post* v. *Arizona Tax Commission*, 411 U.S. 164 (1973).

dians.[50] Concern of the Utah Local Governments over loss of this tax revenue is tempered by the realization that most Reservation Indians do not have the means to pay substantial state taxes.

The Court is now asked by appellants and their *amici* to bar virtually all state taxation of non-Indians within Indian Reservations.[51] They suggest that Indian Tribes be granted full power to set tax policy within Reservations. What began in 1982 as a demand by Tribes for "minimal taxes" "to carry out municipal functions approved and mandated by Congress"[52] has now escalated to a demand for exclusive taxing power by many Indian Tribes. Noticeably absent, however, is any pledge by the Tribes to begin funding the state and local governmental programs those state and local taxes have funded.

It would be fundamentally unfair to require the 54% of San Juan County residents living outside the Utah Navajo Strip to foot the bill for services throughout San Juan County, while at the same time exempting from taxation oil companies who can well afford to pay modest non-discriminatory taxes. *Amicus curiae* the Navajo Tribe of Indians asserts that Navajo taxes support police, fire, courts, health, social welfare and education.[53] However, there is not one Navajo fire station, police station, hospital, clinic, or courtroom on the Utah Navajo Strip, and the Navajo Tribe has not expended one dime of Navajo tax revenue for elementary, secondary or higher

[50] *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973).

[51] The Court rejected the suggestion of the Solicitor General that all state taxes not "justified by a compelling need to protect legitimate, specified state interests other than the generalized desire to collect revenue" in *Ramah Navajo School Board* v. *Bureau of Revenue*, 458 U.S. 832 at 845-846 (1982). Appellants and their *amici* supporters appear to be renewing this suggestion.

[52] *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 138, n.5 (1982).

[53] Brief on behalf of the Navajo Tribe of Indian as *Amicus Curiae*, p. 2.

education, social services, or roads within the Utah Navajo Strip in the last ten years.[54]

When and if the Navajo Tribe or the federal government are prepared to accept full responsibility for all services required by the residents of the Utah Navajo Strip, it may be time to consider stripping San Juan County and the San Juan County School District of all power to tax within the Utah Navajo Strip.[55] But that would be a matter for Congress to decide, perhaps on a Reservation-by-Reservation basis. Until that day comes, the Utah Navajo Strip remains within San Juan County, Utah, and the taxing authority of the local governments must not be further curtailed.

III. EVALUATION OF STATE TAXES UNDER THE COMMERCE CLAUSE MUST CONSIDER ALL SERVICES PROVIDED BY STATE AND LOCAL GOVERNMENT AND PERMIT FLEXIBILITY IN DEALING WITH CHANGING CONDITIONS.

The Jicarilla Apache Reservation is not a representative Indian Reservation. The ratio of natural resource wealth to population is greater than with perhaps any other Tribe.[56] The Council of Energy Resource Tribes is

[54] Nor are matters much different in Arizona, at least with respect to education. In *Peabody Coal Company* v. *Arizona*, 8 Ariz. Adv. Rep. 19 (Ct. App. 1988), Arizona had expended $120-215 million of state monies on education of Navajo children compared with $42 million in tax revenue.

[55] Both San Juan County and the San Juan County School District believe, however, that it would be a tragic error to remove Utah Navajo students from public schools and return them to BIA or tribal schools and to erect once again the barriers between the Reservation and other parts of San Juan County that they have worked long and hard to dissolve over the years. Assigning all governmental rights and responsibilities to the Tribes also does not deal with the problem of counties like Duchesne County, Utah, where non-Indians constitute a large majority of Reservation population but are deprived of any right to vote in tribal elections.

[56] The Jicarilla Apache Tribe has a reserve fund of $50 million, equal to $20,000 per member. Finding of fact 16.

also not representative of Tribes in general but includes by definition only those Tribes with significant energy resources.

There are many Reservations where Reservation tax revenue is minimal in comparison with state and local expenditures for services. Briefs from those Tribes as *amici curiae* are noticeably absent. Cotton Petroleum Corporation, *amici* Texaco, Inc., *et al.*, and their other *amici* supporters are playing a dangerous game, the negative consequences of which may shower on Indians throughout the country who played no part in the decision of this case. If the vast expenditures of state and local governments on Indian Reservations cannot justify any tax except a pure user fee, those governmental entities will be understandably reluctant to provide services on Reservations. If state and local government are held to a strict *quid pro quo* in taxation within Reservations, tax rates will be highest on the poorest Reservations and when oil prices are lowest. Such a system makes no sense at all.

Where the purpose of a tax is to raise revenue, not discourage activity, the economic interests of the states and the Indian Tribes will lead them to reach appropriate compromises on their respective tax levels, without the necessity of judicial intervention.[57] Neither New Mexico nor the Jicarilla Apaches desire to raise taxes so high that they "kill the goose that lays the golden egg." Furthermore, the guidelines in *White Mountain Apache* and *Ramah Navajo School Board*, calling for a particularized inquiry into the circumstances of each case, are adequate to prevent states from abusing their taxing power.

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[57] A mechanism for resolving disputes between the Navajo Tribe and the State of Arizona, New Mexico and Utah already exists. *See* Statement of Policy dated April 19, 1984, between the Chairman of the Navajo Tribal Council and the Governors of New Mexico, Arizona and Utah. A copy of this statement has been lodged with the Clerk of the Court.

Cotton and its *amici* supporters ask the Court to limit state taxes to those taxes necessary to fund services provided directly to the taxpayer. Under such a rule, state and local government could tax schools for funds to operate schools, tax hospitals to build hospitals, tax police to build police stations, tax school teachers to pay their own salaries, tax road construction to build roads and tax oil well production to drill oil wells. Such a power would be absolutely useless. If taxes are to serve their purpose, they cannot be limited to the services returned to each taxpayer.

Appellants, like all oil companies operating on Indian Reservations, need access to state courts and state law to resolve disputes with non-Indian contractors, employees, and business partners. Their employees need fire protection, health care, and schools for their children. State unemployment and worker's compensation programs protect their employees from layoffs and injuries. Their retirees may need nursing homes, hospitals, and home-health care. Social services must be available when family problems develop or when poverty strikes. These companies cannot isolate themselves from the problems and needs of their communities and pay only for those services directly related to their operations.

These *amici* recognize that within Indian Reservations governmental responsibilities traditionally borne by states are shared by federal, state and tribal governments. This occurs not because the responsibility or commitment of state and local government is less,[58] but because the needs of Reservation residents are greater. The combined efforts of all three sovereigns are necessary to the improvement of Reservation life. Utah Local Governments, and other state and local governments throughout the country, are an integral part of this effort.

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[58] *See* Statement of Policy dated April 19, 1984, between the Chairman of the Navajo Tribal Council and the Governors of New Mexico, Arizona and Utah, paragraph 2 of the preamble.

The apportionment methods suggested by appellants and their *amici* supporters are totally unworkable. Existing law, which requires a threshold showing of interference with federal or tribal interests, followed by a balancing of federal, state and tribal interests, is sufficient to invalidate taxes that truly interfere and are not justified. Nothing more is needed.

CONCLUSION

For the foregoing reasons, these *amici* respectfully request that the Court affirm the judgment of the Court of Appeals of New Mexico.

Respectfully submitted,

L. Robert Anderson
Lyle Robert Anderson *
Anderson & Anderson, P.C.
P.O. Box 275
Monticello, Utah 84535
Telephone (801) 587-2222

Alvin G. Nash
Uintah County Attorney
152 East 100 North
Vernal, Utah 84078
Telephone (801) 781-0770

Craig C. Halls
San Juan County Attorney
P.O. Box 850
Monticello, Utah 84535
Telephone (801) 587-2231

Herbert W. Gillespie
Duchesne County Attorney
45 East 100 North
Duchesne, Utah 84066
Telephone (801) 738-2683

* Counsel of Record

September 2, 1988

AMICUS CURIAE

BRIEF

(18)

No. 87-1327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,
v.

STATE OF NEW MEXICO, *et al.*,
Appellees.

On Appeal from the Court of Appeals of New Mexico

BRIEF OF THE STATES OF ARIZONA, CALIFORNIA, COLORADO, FLORIDA, IOWA, MONTANA, NORTH DAKOTA, OKLAHOMA, SOUTH DAKOTA, UTAH, WASHINGTON, WISCONSIN AND WYOMING AS *AMICI CURIAE*

DAVID L. WILKINSON
Attorney General
MICHAEL M. QUEALY
Assistant Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114

ROBERT K. CORBIN
Attorney General
ANTHONY B. CHING
Solicitor General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007

DUANE WOODARD
Attorney General
State of Colorado
1525 Sherman Street
Denver, Colorado 80203

A. RAYMOND RANDOLPH *
Special Assistant Attorney
General for the State of Utah
BRUCE R. STEWART
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

JOHN K. VAN DE KAMP
Attorney General
JAMES B. CUNEO
Deputy Attorney General
State of California
350 McAllister Street
Suite 6000
San Francisco, California 94102

THOMAS J. MILLER
Attorney General
State of Iowa
The Capitol
Hoover Building
Des Moines, Iowa 50319

* Counsel of Record

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

67 pp

ROBERT A. BUTTERWORTH
Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399

MICHAEL T. GREELY
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401

ROBERT H. HENRY
Attorney General
State of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105

KENNETH O. EIKENBERRY
Attorney General
State of Washington
7th Floor
Highway Licenses Building
Olympia, Washington 98504

JOSEPH B. MEYER
Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

NICHOLAS J. SPAETH
Attorney General
State of North Dakota
State Capitol
Bismarck, North Dakota 58505

ROGER A. TELLINGHUISEN
Attorney General
State of South Dakota
State Capitol Building
Pierre, South Dakota 57501

DONALD J. HANAWAY
Attorney General
State of Wisconsin
114 East State Capitol
Madison, Wisconsin 53707

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INTEREST OF THE *AMICI CURIAE*

Each of the States submitting this Brief contains one or more Indian Reservations where substantial State services are provided to its Indian and non-Indian citizens who live there.

SUMMARY OF ARGUMENT

There was a time when appellants' arguments in this case would have carried the day. On constitutional grounds, Supreme Court decisions early in this century immunized oil and gas lessees on Indian Reservations from some, but not all, forms of State taxes whenever the governing federal legislation was silent. The Court reasoned that State taxes theoretically could interfere with the efforts of the United States to protect its Indian wards and to make the best terms for them.

Throughout this period Congress responded by consistently manifesting its disagreement with the Court's tax immunity decisions. Two statutes of particular importance to this case—the Indian Oil Leasing Act of 1924 (applicable to Treaty Reservations) and the Indian Oil Act of 1927 (applicable to Executive Order Reservations)—specifically authorized the States to tax oil company lessees despite the Court's decisions.

Several months *before* enactment of the 1938 Indian Mineral Leasing Act, the Court—at the urging of the federal government—overruled its tax immunity decisions with respect to oil and gas lessees on Indian lands. In *Helvering v. Mountain Producers Corporation*, 303 U.S. 376 (1938), the Court held that such oil lessees were henceforth subject to State taxation unless and until Congress affirmatively bestowed tax immunity on them.

The 1938 Indian Mineral Leasing Act, on which appellants rest their immunity claim, is silent with respect to State taxation, and under *Mountain Producers*, it therefore could not possibly have preempted State tax statutes.

This in itself is sufficient to sustain New Mexico's taxes. After telling Congress for half a century that oil lessees must pay State taxes when Congress has been silent, the Court should not today say that because Congress has remained mute, the oil companies are now exempt from State taxation.

Moreover, the bill leading to the Act was drafted by an Administration opposed to giving non-Indian oil lessees immunity from State taxes. The bill was reported favorably by Committees of Congress whose members were also opposed to State tax immunity for such lessees operating on Indian lands. The long battle to have the Court overrule its decisions giving tax immunity to oil lessees—a battle waged by the States, by Congress, by the Administration and by some of the most respected Justices in this Court's history—had just been won in *Mountain Producers*. The notion that only a few months later, Congress—without any hearings, without any analysis, without saying a word on the subject—tossed that victory aside is pure fantasy, as the federal government argued in *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949). The Court there relied on the broad principles laid down in *Mountain Producers* and reiterated that State tax immunity for oil lessees operating on Indian lands may not be inferred from congressional silence.

But that is not all. The 1938 Act repealed only portions of statutes inconsistent with its terms. The provisions of the 1924 and 1927 Acts sanctioning State taxation of oil lessees are still on the books. They are not inconsistent with the 1938 Act and constitute affirmative authorization for the State taxes challenged here. That result is consistent with *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), which held only that Tribes could not be taxed on their royalty interests under the 1924 Act in light of Congress' silence in the 1938 legislation. The decision, and the Court's view of these two statutes, rested entirely on canons of construction favoring Indian Tribes.

But there are no such canons with respect to oil companies, nor should there be. The Tribe itself suffers no financial burden from the State taxes imposed on private oil companies. The trial court so found and that finding is amply supported not only by the record but also by all three branches of the federal government.

There is nothing to appellants' alternative argument that Tribes or Reservations should be treated as States under the Commerce Clause for the purpose of evaluating State taxes. Appellants' theory is that oil companies are immune from State taxes unless the State provides benefits to them and the Tribe equal to the amount of those taxes. If adopted, that theory would thrust Reservations and States across the country into a perpetual state of massive and intractable litigation and would present State governments and courts with an administrative nightmare. Congress and Congress alone may make adjustments with respect to the combined level of federal, State and tribal taxation of oil companies drilling on Indian Reservations. It is certain that if Congress did act, it would not adopt the scheme appellants ask this Court to impose on the States.

I. STATE TAXES SUPPORT THE DUTIES AND RESPONSIBILITIES OF THE STATES TOWARD THEIR INDIAN CITIZENS

Indian Reservations vary widely. On some Reservations, tribal members constitute a majority of the population; on others, Indians represent but a small fraction of the total population.[1] Reservations may contain vast areas of land owned by non-Indians or may consist almost entirely of land held in trust by the United States

[1] General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages," at pp. 1-300 - 1-303.

for the Tribe.[2] Within Reservations, there are State and county roads and highways and towns and cities that are indistinguishable from those outside the boundaries. State social services are provided. Elementary and secondary schools for Reservation children, Indian and non-Indian alike, are almost invariably public schools, constructed, maintained and operated by State and local governments.

It is therefore hardly surprising that "[f]or 90 percent of all Indians in the United States . . . Indian education today is public school education."[3] The federal government, on the other hand, "is likely to have direct responsibility for Indian education only in special circumstances." *BIA Report* 37.[4] The financial burden of educating Indian children thus falls on State and local governments and that burden is considerable despite the federal funds that are made available. *BIA Report* 166.[5]

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[2] *See DeCoteau v. District County Court*, 420 U.S. 425, 431 (1975).

[3] Bureau of Indian Affairs, Department of the Interior, *Report on BIA Education: Excellence in Indian Education Through the Effective School Process* 35 (Final Review Draft, March 1988) (hereinafter "*BIA Report*"). Many Indians prefer to have their children "educated in an integrated school setting with both Indian and non-Indian students." *BIA Report* 148. "Education of Indian students in public schools exposes them in their youth to the values and outlook of mainstream American society. Few, if any, Indians will live their lives without extensive contact with this society. Early exposure may diminish the later burden of adaptation and learning. The economic development of Indian reservations will depend on the emergence of a class of Indian workers and businessmen able to function in the two cultures." *BIA Report* 148-149.

[4] *Ramah Navajo School District Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 843 (1982), referred to "the comprehensive federal scheme intended to provide this education [for Indian school children]—a scheme which has 'left the State with no duties or responsibilities.' *Warren Trading Post Co. v. Arizona Tax Comm'n* . . . ." But the fact is that the States—not the federal government—are performing the duty and undertaking the responsibility of educating 90% of all Indian children.

[5] Indeed, the BIA encourages Tribes to establish separate public school districts on their Reservations in order to receive the "*substantial state funds similarly now available to any school district within the state.*" *BIA Report* 258 (emphasis added).

Reservations simply do not exist in isolation. They are part of the State in which they are located and so are their Indian residents, who are citizens of the State. *Iowa Mutual Insurance Co. v. LaPlante*, 107 S. Ct. 971, 977-78 n.10 (1987). As such, tribal members have a right to vote and to run for State and local offices. They are, moreover, entitled to the State services available to all other citizens, although neither their Tribe nor its trust land can be taxed without congressional consent.[6] No State can discriminate against tribal members on the basis that they are Indians, just as no State can discriminate against any of its citizens on the basis of their race or religion.[7]

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[6] The immunity of Indian Tribes and their land from State taxation stemmed from the fact that Indians had not been considered citizens. *See The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867); *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 602 (1943).

[7] *See, e.g., Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) (right of Reservation Indians to vote in county elections); *Chase v. McMasters*, 573 F.2d 1011 (8th Cir.) (Reservation Indians entitled to have homes connected to city sewer and water lines), *cert. denied*, 439 U.S. 965 (1978); *Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153 (8th Cir. 1985) (Reservation Indians must be provided municipal services on same basis as other citizens of municipality), *cert. denied*, 475 U.S. 1011 (1986); *State ex rel. Williams v. Kamp*, 106 Mont. 444 (Mont. 1938) (Reservation Indians entitled to receive State general relief, medical aid and hospitalization); *Begay v. Sawtelle*, 53 Ariz 304, 88 P.2d 999 (Ariz. 1939) (Reservation Indians entitled to resident licenses for off-Reservation hunting and fishing); *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (Ariz. 1948) (upholding civil rights of Reservation Indians); *Acosta v. County of San Diego*, 272 P.2d 92 (D. Cal. 1954) (Reservation Indians entitled to direct county welfare payments); *Prince v. Board of Education*, 88 N.M. 548, 543 P.2d 1176 (N.M. 1975) (upholding right of Res-

For these reasons, States containing Indian Reservations "simply cannot afford to have a diminished tax base. . . . While it is true that there are some compensations provided [by the federal government], about a fourth of what it takes to educate a student—that is impact aid—and a little bit of county road money on the reservation, but not near enough, is provided by the BIA. The county has to provide the remainder. All of those services must be provided. And these are poor counties for the most part." 133 Cong. Rec. 16,951 (1987) (remarks of Sen. Melcher). Furthermore, on Reservations "there are communities that have grown up over the last 150 years, railroads, airports, cities, and county governments, school districts, transportation networks, electric power lines, telephone lines, running over all of this land to provide services to all of the peoples who live there, Indian and non-Indian. . . . [T]he Indian population gets services given to them not based upon the taxation of the lands they own. . . . But it is also correct to say the majority of the services they get in these communities are not provided by Federal Government nor tribal sources. The majority of the services in those areas are provided by taxation under State law." 133 Cong. Rec. 16,952 (1987) (remarks of Sen. McClure).[8]

ervation Indians to obligate county, through election, to $6 million bond issue for schools on Reservation).

The dictum in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 691 (1965)—that the States have "no duties or responsibilities respecting the reservation Indians"—is not correct.

[8] The Senators' remarks were made in opposition to an amendment defeated on the Senate floor that would have barred States from taxing former fee land returned to trust status under the Agricultural Credit Act of 1987, P.L. 100-233, Jan. 6, 1988.

II. CONGRESS HAS AUTHORIZED STATE TAXATION OF OIL AND GAS LESSEES ON INDIAN RESERVATIONS

At no time in the history of this country has Congress passed legislation granting State tax immunity to oil companies operating on Indian Reservations. As we recount below, all the legislation on this subject has been in the opposite direction, and for good reason. Oil and gas companies enter into leases on Indian Reservations for one purpose—to make money. Even if execution of the leases does not result in a conveyance of the oil in place,[9] these companies after extracting oil sell it as their own, realizing their often enormous profits in private transactions.[10] The oil companies then use their earnings for whatever purposes they see fit.[11]

If such companies were immune from State taxes—or federal or tribal taxes—their profits would of course increase. But that would not boost the revenues of their "commercial partner,"[12] the Tribe. The trial court in this case so found and the accuracy of that finding cannot be disputed.[13]

[9] *But see Group No. 1 Oil Corp. v. Bass*, 283 U.S. 279 (1931) (granting of leases constituted sale of oil and gas in place).

[10] Oil prices are not affected by State taxes. Whatever a producer receives per barrel at the refinery is determined by the posted price of oil, which at any given time may be affected by factors such as tensions in the Middle East or curtailment in production overseas.

[11] Cotton Petroleum admits that it no longer owns any leases on the Jicarilla Reservation and that its interest here is solely in recovering tax refunds from the State. Brief of Appellants Cotton Petroleum, *et al.*, at 4 n.2. How requiring New Mexico to refund taxes to Cotton Petroleum would benefit the Tribe is a subject Cotton Petroleum never addresses.

[12] *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985).

[13] Neither the royalty rate nor production under the leases is influenced by State taxes. As the federal government reported to the Court after studying a ten year period, "it seems a safe conclu-

In seeking tax immunity on the basis of the 1938 Indian Mineral Leasing Act, appellants and their *amici* refuse to confront these facts and they entirely ignore more than half a century of federal legislative, judicial and executive action that bears directly on the meaning of that statute. This history shows that appellants' arguments in favor of State tax immunity are not new and that all branches of the federal government have rejected them, which is why not very long ago it was clear to this Court that "[l]essees of otherwise exempt Indian lands are also subject to state taxation." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 157 (1973).

A. Oil Lessees Were Not Exempt from State Taxes When the 1938 Indian Mineral Leasing Act Became Law

Congress first authorized leasing on Treaty Reservations in the Act of Feb. 28, 1891, 26 Stat. 794. The Act empowered Tribes to enter into grazing and mining leases, but said nothing about whether States could tax

sion that the lessee's tax status has little, if any effect, on the Indian royalty owners." Brief for the United States as *Amicus Curiae*, at 38, in *Oklahoma Tax Commission v. Texas Co.*, Oct. Term 1948, Nos. 40 & 41, reprinted as an Addendum to this Brief, at pp. 10a-27a. *See Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 363-64 & n.36 (1949) (referring to the argument that State taxes affect royalty rates as merely hypothetical). *See also* notes 19, 23 and 30 *infra*.

Moreover, Congress found during its consideration of the Crude Oil Windfall Profits Tax Act of 1980 that even federal tax rates of up to 70 percent on windfall profits would not have an adverse effect on oil production. *See, e.g.*, H.R. Conf. Rep. No. 817, 96th Cong., 2d Sess. 7 (1980).

In cases similar to this now pending in Utah, involving many of the world's largest oil and gas companies, those companies conceded that the State taxes imposed on them do not affect their exploration, development or production of oil and gas from the Navajo Reservation. Order of Nov. 9, 1987, as amended December 22, 1987, in *Texaco, Inc. v. San Juan County, et al.*, Consolidated Cases Civ. Nos. 4152-4153, 4156-4157, 4973-4977 (7th Jud. District Court for San Juan Co., Utah).

the non-Indian lessees. In *Thomas v. Gay*, 169 U.S. 264, 274 (1898), the Court ruled that the State could tax such lessees,[14] and had not violated the Indian Commerce Clause by doing so. The Court rejected the lessees' argument—which appellants repeat here—that they were not receiving benefits from the State in proportion to the taxes collected from them.

In the years following *Thomas v. Gay*, however, the Court began conferring, as a matter of constitutional law, immunity on "instrumentalities" of the federal and state governments. *See South Carolina v. Baker*, 108 S. Ct. 1355 (1988). This now-discredited doctrine rested, as do many of appellants' contentions, on the supposed need to protect sovereignty. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 400 (1932); *Indian Motorcycle Co. v. United States*, 283 U.S. 570 (1931); *United States v. New Mexico*, 455 U.S. 720, 735 (1982).

Having decided that restricted Indian lands were federal "instrumentalities" (*United States v. Rickert*, 188 U.S. 432 (1903)), the Court extended the "instrumentality" concept to private mining companies operating within Indian Reservations and bestowed on them immunity from some, but not all, forms of State taxes.[15] According to *Indian Territory Illuminating Oil Co. v. Oklahoma*, "[a] tax upon the leases is a tax upon the power

[14] *Forbes v. Gracey*, 94 U.S. 762, 766 (1877), held that private mining claims granted by the Government in the public lands of the United States, and the ores and minerals derived from them, were subject to State taxation.

[15] Thus, the Court ruled that such non-Indian mineral lessees were exempt from State occupation and privilege taxes (*Choctaw, O. & G. R. Co. v. Harrison*, 235 U.S. 292 (1914)); from State taxes on the value of their leasehold (*Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522 (1916)); from State gross production taxes (*Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1917); *Large Oil Co. v. Howard*, 248 U.S. 549 (1919)); and from State *ad valorem* taxes in some circumstances (*Jaybird Mining Co. v. Weir*, 271 U.S. 609 (1926)).

to make them, and could be used to destroy the power to make them." 240 U.S. at 530.

The doctrine reached its zenith in 1922 in *Gillespie v. Oklahoma*, 257 U.S. 501 (1922), when the Court invalidated a State tax on the net income derived by a non-Indian lessee from sales of his share of oil produced on Indian lands. As the Court saw it, "stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms it can for its wards." 257 U.S. at 506.

This judicially-created immunity in favor of federal "instrumentalities" was not absolute. Congress could, if it wished, "waive" the immunity (*see, e.g., Jaybird Mining Co. v. Weir*, 271 U.S. 609, 613 (1926)) and Congress frequently did so during the 1920's by affirmatively sanctioning State taxation of oil and gas lessees and other private companies on federal and Indian lands.[16] Of particular significance to this case are two legislative measures in which Congress manifested its disagreement with the Court's tax immunity doctrine.

The Indian Oil Leasing Act of 1924, 43 Stat. 244, which amended the 1891 Act, adopted the Interior Department's policy of leasing at public auction and extended the permissible terms of leases from ten years to so long as oil and gas were found in paying quantities. In this statute, now codified as 25 U.S.C. § 398, Congress expressly authorized State taxation of oil and gas lessees operating on Treaty Reservations.

[16] For example, in Section 32 of the Mineral Lands Leasing Act of 1920, 41 Stat. 450, 30 U.S.C. § 189, Congress authorized States to impose taxes on federal lessees in order to remove any doubt about the matter and granted States 37.5% of the royalties collected by the federal government. *See Mid-Northern Oil Co. v. Walker*, 268 U.S. 45, 48-50 (1925); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 629-33 (1981).

One year later, in Section 5 of the Act of March 3, 1921, 41 Stat. 1250, Congress authorized the State of Oklahoma to impose a gross production tax on oil produced by non-Indian lessees of the Osage Tribe. *Cf. Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1917); *Large Oil Co. v. Howard*, 248 U.S. 549 (1919); *see Oklahoma ex rel. Oklahoma Tax Commission v. Barnsdall Refineries, Inc.*, 296 U.S. 521 (1936). In the Act of May 10, 1928, 45 Stat. 496, Congress permitted State taxation of oil and gas lessees operating on restricted lands of the Five Civilized Tribes.

Three years later, Congress enacted "the most important single piece of general Indian legislation in the 1920's," representing a "great victory for those who possessed executive-order reservations."[17] For the first time in the nation's history, the Indian Oil Act of 1927, Act of March 3, 1927, 44 Stat. 1347, authorized oil and gas leasing on Executive Order Reservations.[18] The 1927 Act, which was passed only after years of extended debate and consideration, provided—as had the 1920 Act relating to the leasing of federal lands and the 1924 Act relating to Treaty Reservations—that "taxes may be levied and collected by the State or local authority . . . [on] any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected . . . ." Ch. 299, sec. 3, 44 Stat. 1347, codified at 25 U.S.C. § 398c.[19]

[17] L. Kelly, *The Navajo Indians and Federal Indian Policy* 99, 100 (1968) (hereafter *The Navajo Indians*).

[18] One earlier statute, the Metalliferous Minerals Act of 1919, had authorized leases for the mining of gold, silver, copper and other minerals (except oil and gas) on both Treaty and Executive Order Reservations in the States of Arizona, California, Idaho, Montana, Nevada, New Mexico, Oregon, Washington and Wyoming. The 1919 Act expressly provided that it was not to be construed to affect the rights of States and local authorities to levy and collect taxes from the *lessees*. Act of June 30, 1919, sec. 26, 41 Stat. 31.

[19] Kelly describes in detail the extensive history leading to the 1927 Act. *The Navajo Indians* 48-103. During the early 1920's, a controversy developed regarding who had title to Executive Order Reservations—the Indian tribes or the federal government. If title were held by the United States, it was thought, these lands could be leased under the Mineral Lands Leasing Act of 1920, which meant

While Congress was thus "overruling" the Court's tax immunity decisions, the Court itself was beginning to retreat from them. The Court upheld State taxes on oil

that 37.5% of the royalties would go to the States and that the States could tax oil and gas production. *See* note 16 *supra*.

However, in 1924 then-Attorney General Stone determined that the Mineral Lands Leasing Act was not applicable to Executive Order Reservations. 34 *Op. Att'y Gen.* 171-92 (1926); *see* Justice Stevens' dissenting opinion in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 162 n.4 (1982). New federal legislation was therefore needed to permit oil and gas leasing of Executive Order Reservations but, according to the Interior Department, no such statute could be passed unless the States were treated in the same manner as they were under the Mineral Lands Leasing Act. *The Navajo Indians* 73.

For the next several years various legislative solutions were proposed and considered, but without success. One bill, sponsored by the Interior Department, provided after amendment that the States would receive 37.5% of the royalties from oil and gas production on Executive Order Reservations in lieu of taxes. *Id.* at 78. Another bill along the same lines would have required the States to use their portion of the royalties "for the construction and maintenance of public roads within their respective reservations" or "for the support of public schools attended by Indian children." House Committee on Indian Affairs, *Hearings on H.R. 9133, Leasing of Executive Order Reservations*, 69th Cong., 1st Sess. 1-2 (1926). In the Senate a bill was introduced putting Executive Order Reservations under the Indian Oil Leasing Act of 1924 with the added provision that the States would receive 37.5% of the royalties without strings attached. Senate Committee on Indian Affairs, *Hearings on S. 1722 and S. 3159*, 69th Cong., 1st Sess. 1-3 (1926). Still another proposal would have subjected the Indians to pay a production tax to the States. *The Navajo Indians* 80. When questioned about why the producers would not be subjected to State taxation under this proposal, its sponsor replied that if they were immune from taxation, the oil and gas companies would pay a higher percentage royalty to the Indians—an answer Committee members considered "entirely specious." *Id.* at 81 n.13.

In 1926, Congress finally passed rather complicated legislation giving the Indians 100% of the royalties but subjecting oil and gas lessees to State taxation, only to have the President veto it. *Id.* at 91-92.

lessees by making hair-splitting distinctions of *Gillespie* and other cases following it.[20] Justices Stone, Brandeis, Cardozo and Roberts called for *Gillespie's* overruling,[21] and by the 1930's, the judicially-created immunity of non-Indian lessees from State taxation was "hanging by a slender thread." Powell, *The Waning of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 633, 634 (1945).

In 1937, the ultimate demise of *Gillespie* became apparent. In *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), the federal government as *amicus curiae* urged the Court to overrule its decisions in this area and to hold that so long as the State tax on the so-called "instrumentality" is nondiscriminatory, it should be upheld.[22] The Court in *James* limited its prior decisions "to their particular facts" (302 U.S. at 151); rejected the government contractor's claim of "derivative" immunity (302 U.S. at 158); and left to Congress the decision whether

[20] *See, e.g., Group No. 1 Oil Corp. v. Bass*, 283 U.S. 279, 282-83 (1931) (sustaining State tax on oil lessee on the basis that upon entering into the lease, the lessee became the owner of the oil underground); *Indian Territory Illuminating Oil Co. v. Board of Equalization*, 288 U.S. 325 (1933) (sustaining State *ad valorem* tax on lessee's oil where oil had been severed from restricted Indian lands and stored in the owner's tanks); *Taber v. Indian Territory Illuminating Oil Co.*, 300 U.S. 1 (1937) (sustaining State *ad valorem* tax on the equipment of a non-Indian oil lessee operating on restricted Indian lands).

Cases from Oklahoma continued to reach the Court because the 1924 Act expressly excluded from its coverage the lands of the Five Civilized Tribes and the Osage Tribe. The Court's decisions rested, however, on general principles applicable to all Tribes in the absence of any congressional directive regarding State tax immunity of their lessees.

[21] *See Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 401 (1932) (Stone, J., dissenting); 285 U.S. at 405 (Brandeis, J., dissenting).

[22] Excerpts of the Brief for the United States as *Amicus Curiae* in *James v. Dravo Contracting Co., supra*, Oct. Term 1937, Nos. 3, 7, 8, are reprinted as an Addendum to this Brief, at pp. 8a-9a.

federal contractors should be exempt from State taxes (302 U.S. at 161).

Helvering v. Mountain Producers Corporation, 303 U.S. 376 (1938), marked the end of the tax immunity doctrine as applied to lessees on Indian lands. Again at the urging of the United States,[23] the Court held that its decision in *Gillespie* and *Burnet v. Coronado Oil & Gas Co.*, "are out of harmony with correct principle and accordingly they should be, and they now are, overruled." 303 U.S. at 387. The Court specifically disagreed with the "theoretical conceptions" that a State tax upon the lessees was a tax upon the power to make the leases and interfered with efforts of the United States to make the best terms for its Indian wards. 303 U.S. at 384-87. Under *Mountain Producers*, oil and gas lessees operating on Indian lands were henceforth subject to State taxation unless Congress directed otherwise. No longer would the Court confer State tax immunity in the face of congressional silence. Just the opposite. "Silence of Congress implies immunity no more than does the silence of the Constitution." *Graves v. People of the State of New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939). Thus, "if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." 306 U.S. at 480, 483.[24]

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[23] Excerpts of the Solicitor General's Brief in *Mountain Producers* are reprinted as an Addendum to this Brief, at pp. 1a-7a. As the Government there discussed, oil production on Indian Reservations is not influenced by State taxes on the producer-lessees. An oil company's decisions about drilling "are shaped by geologic rather than cost accounting estimates." Brief for the Petitioner, reprinted at the Addendum, p. 6a.

[24] In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150-51 (1980), the Court said that it "is simply not the law" that States "may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary." The key word is "express." Even under the cases discussed in the text, which *White Mountain* did not address, there need not be an "express" statement by Congress conferring immunity so long as the legislation and its history indicate that this was its purpose.

Mountain Producers was decided on March 7, 1938. Two months later, on May 2, 1938, what became the Indian Mineral Leasing Act of 1938 was passed by the Senate (81 Cong. Rec. 8,399) and on May 11, 1938, was signed into law.

B. The 1938 Indian Mineral Leasing Act Did Not Oust State Taxing Authority

Appellants seek to convince the Court that the 1938 Act preempts the New Mexico tax statutes at issue here. But the 1938 Act is completely silent about State tax immunity for non-Indian oil and gas lessees and under *Mountain Producers* such immunity cannot be inferred. Apart from that, the history of the Act contradicts appellants' position. In saying this, we are mindful of the Court's call for "a particularized inquiry into the nature of the state, federal and tribal interests at stake" when questions of preemption are presented. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 144-45. Unlike appellants, however, we recognize that the purpose of that inquiry is, as the Court said, to determine the meaning of the "language" and "policies" of federal statutes (*ibid.*), not to place the Court in the legislative role of determining what those policies should be.

The bill leading to the 1938 Indian Mineral Leasing Act was drafted by the Department of the Interior and transmitted to the House and Senate Committees on Indian Affairs. S. Rep. No. 985, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938). Neither the House nor the Senate Committees held hearings on the proposed legislation.

The House and Senate Committee Reports consist only of a few lines recommending passage, but without any

comment or analysis of the bill. Reprinted in both Reports is a letter from the Acting Secretary of the Interior explaining why the proposed bill was needed. His explanation contained nothing controversial and the problems he identified were unrelated to oil and gas leasing.[25] In fact, the leasing provisions of the 1938 Act, which were to apply to all minerals on all Reservations, appear modelled on the oil and gas leasing provisions in the 1924 and 1927 Acts.[26]

Not a word in the Acting Secretary's letter even remotely suggests that the existing State taxing authority under the 1924 and 1927 Acts would be revoked if the Department's draft were enacted. Such a proposal would have represented a dramatic shift in policy for no apparent reason. The taxing provision in the 1927 Act, as its history shows, reflected Congress' accommodation of State, tribal and federal interests, an accommodation reached only after many years of controversy. *See* note

[25] The Acting Secretary explained that except in the States mentioned in the Metalliferous Mining Act of 1919 (*see* note 18 *supra*), the only leases that could be granted in Executive Order Reservations were oil and gas leases, which were authorized by the 1927 Act (*see* note 19 *supra*).

The Metalliferous Mining Act had created other problems. The Interior Department believed that under that statute it had to grant a lease even if the Tribe objected, yet the Indian Reorganization Act of 1934 (48 Stat. 984) provided that organized Tribes had the right to prevent leasing of tribal lands.

In addition, the Metalliferous Mining Act was "not adequate to give the Indians the greatest return from their property" because it did not provide for leasing sufficient acreage to allow the discoverer to "follow the ore . . . indefinitely." This restriction created particularly urgent problems with respect to "leasing deposits of building stone, sand, gravel and metalliferous minerals."

[26] All three statutes provided that lease terms would be for 10 years and so long as oil and gas were found in paying quantities; all three statutes required that leases be offered at public auction; and all three statutes required tribal consent before leases could be granted.

19 *supra*. It is implausible in the extreme that a short 11 years later Congress would completely reverse its carefully considered policy without any hearings, without any debates, without any comment or analysis by its Committees and without inserting even a word on the subject in the legislation itself.

If, *for the first time* in history, *Congress*—rather than the Court—was planning to grant non-Indian oil and gas lessees immunity from State taxation, the bill and the Committee Reports would have said so. The potentially profound effect on the budgets of those States that had been taxing oil and gas lessees pursuant to the 1924 Act[27] and the 1927 Act certainly would have been a matter of comment and concern. That the record is completely silent leads to but one conclusion—the 1938 Act was not designed and was not intended to immunize oil and gas lessees from State taxes.[28]

[27] *See British-American Oil Producing Co. v. Board of Equalization*, 299 U.S. 159 (1936), holding that the 1924 Act authorized Montana to impose its gross production and net proceeds taxes on an oil company operating on the Blackfeet Reservation.

The parties in *British-American* had "conceded that the State is without power to apply either [tax] to the production under this lease, save and except as Congress may have given its assent" (299 U.S. at 161). Overlooking *Mountain Producers*, the United States and some of the *amici* made the mistake of asserting that this concession reflected the prevailing rule at the time the 1938 Act became law. *See* Motion to Affirm of the United States in *Montana v. Crow Tribe*, No. 87-343, Oct. Term 1987, at pp. 15-16; Brief *Amicus Curiae* of the Blackfeet Tribe, *et al.*, in this case, at pp. 5 n.1, 11. They compound this mistake by assuming that the concession encompassed *all* forms of State taxes. But even before *Mountain Producers*, and even in the absence of affirmative congressional consent, non-Indian oil and gas lessees had no immunity against State *ad valorem* taxes on their property and equipment, or on their share of the oil. *Taber v. Indian Territory Illuminating Oil Co., supra; Indian Territory Illuminating Oil Co. v. Board of Equalization, supra.*

[28] *Montana v. Crow Tribe of Indians*, 819 F.2d 895 (9th Cir. 1987), *summarily affirmed*, 108 S. Ct. 685 (1988), is not to the contrary

There cannot be even the slightest doubt about this. The bill was drafted and proposed by the Executive Branch while it was advocating in this Court—successfully—that oil and gas lessees operating on Indian Reservations should *not* be immune from State taxation unless Congress expressly stated otherwise.[29] Moreover, the Interior Department's proposed bill received the unanimous vote of both the Senate and House Committees on Indian Affairs—an inconceivable result if the legislation had the effect appellants ascribe to it. The Chairmen of both committees—Senator Thomas and Representative Rogers—had contemporaneously sponsored Resolutions protesting the Court's granting of State tax immunity to private oil and gas companies operating on Indian lands.[30] In

and, at all events, the Court's summary affirmance is not entitled to "the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

The lower court decision in *Crow* struck down, on preemption grounds, the State's 30% severance tax on coal. In the coal industry, unlike the situation with respect to oil, State taxes are added to the price paid by the purchaser. 819 F.2d at 899. The court of appeals concluded that the Tribe suffered financially as a result because the increases in price brought on by the State tax rendered coal from the State non-competitive, lowering demand and decreasing the Tribe's royalty revenues accordingly. Neither the quantum of taxation nor the significant adverse effect on competition is present here.

Moreover, the extensive history showing congressional, judicial and executive action aimed at subjecting non-Indian oil and gas lessees to State taxation is not present with respect to coal.

[29] *See* the Government's briefs in *James* and *Mountain Producers*, excerpts of which are attached hereto in the Addendum. It is safe to assume that before taking that position in the Supreme Court, the Solicitor General would have followed the usual course of consulting with interested government agencies, including the Department of the Interior.

[30] *See* H.R.J. Res. 478, 81 Cong. Rec. 2,238 (1937), and Representative Rogers' remarks about the "unsoundness of the opinions of the

May 1938, shortly before the Indian Mineral Leasing Act was signed into law, the Senate Committee on Indian Affairs heard testimony praising the *Mountain Producers* decision for removing State tax immunity from non-Indian oil and gas lessees.[31]

In the face of this history, it is nothing short of impossible to conclude that Congress, in 1938, silently conferred immunity from State taxes on oil and gas companies after passing in the previous decade carefully considered legislation doing precisely the opposite. The long battle to have *Gillespie* overruled—a battle waged by the States, by Congress, by the Administration and by some of the most respected Justices in this Court's history—had just been won. The notion that only a few months later, the 1938 Act silently tossed that victory aside is preposterous.

Supreme Court" and the fact that "the property owners of the State [of Oklahoma, which was not covered by the 1924 Act or the 1927 Act] have sustained a loss of approximately $100,000,000 by the increased taxes required to make up for the lack of taxes from the exempt Indian lands and the oil and gas from restricted Indian lands." 81 Cong. Rec. at 2,239, 2,240. The Joint Resolution called upon the federal government to reimburse the States for their lost tax revenues.

Representative Rogers further pointed out that State taxes had no effect whatever on the amounts received by the Indian lessors in royalty payments or on the oil companies' decisions whether to lease. 81 Cong. Rec. at 2,242; *see also* 81 Cong. Rec. at 2,241-2,242 ("everybody in Oklahoma and every other oil field knows that the only controlling consideration for the purchase of an oil and gas lease is the expectancy for oil").

[31] *See Hearing Before the Senate Committee on Indian Affairs on S. Res. 168*, 75th Cong., 3d Sess. 10, 13 (1938).

The Senate Resolution protested that Oklahoma had "provided school facilities, police protection, and highways and maintained courts of justice, recording offices, and other facilities of government which have been available to the Indians as well as to other citizens" of the State, and yet—because of the tax exemption of oil and gas lessees—non-Indian citizens of the State were being forced to subsidize the "ward[s] of the United States." *Id.* at 1, 2.

That indeed is what the United States told this Court ten years later, in 1948, when the issue surfaced once again.[32] In *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), an oil company leasing Indian lands argued that the overruling of *Gillespie* in *Mountain Producers* removed only immunity from State income taxes and that oil and gas lessees were still exempt from other State taxes, such as the gross production tax at issue in the case. 336 U.S. at 362. The Court rejected that argument on the ground that *Mountain Producers* was a broad decision, completely undercutting the principles on which the immunity of lessees had rested. 336 U.S. at 363.

The Court in *Texas Co.* then turned to a question critical to this case—namely, whether the silence of Congress regarding state taxation in legislation authorizing the oil and gas leasing on Indian lands should be construed to immunize non-Indian lessees. 336 U.S. at 365-67. On that score, the Court held as follows: (1) the decision to extend immunity to oil and gas lessees operating on Indian lands "is essentially legislative in character"; and (2) when Congress has not created "an immunity . . . by affirmative action," "'[t]he immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.'" 336 U.S. at 366 (quoting *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 604 (1943)); *see Mescalero Apache Tribe v. Jones*, 411 U.S. at 154-57.[33]

[32] *See* Brief for the United States as *Amicus Curiae*, at p. 34, reprinted at pp. 22a-23a *infra*. The question arose because, as we have stated (*see* notes 16 and 20 *supra*), the Five Civilized Tribes and the Osage Tribe were not included in the 1924 Act, but were governed by separate legislation.

[33] Neither *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982), nor *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), supports appellants' claim of preemption. Neither case involved the 1938 Act and in both cases the burden of State taxes on non-Indian contractors was passed on to the Tribe, which is not the situation in this case. *But see* then-Justice Rehnquist's dissenting opinion in *Ramah*, 458 U.S. at 854-858 n.4. Moreover, we deal here with a subject—State taxation of non-Indian oil and gas lessees—that has an extensive history, a history showing not only that State taxes contravene no federal policy or program, but also that Congress, this Court and the Executive Branch have agreed that the oil companies are subject to State taxes on their Reservation operations.

In summary, we cannot improve upon the argument of the United States in the *Texas Company* case, which contains many of the essential points of our position:[34]

> Congress formerly acted on the assumption that the immunity of the lessee existed until waived by legislative action. This was so, however, only because such was the constitutional situation under the prevailing decisions. It does not follow, however, that Congress, ignoring the subsequent decisions of this Court, has tacitly made the same assumption during the past 10 years [that is, since March 1938 when *Mountain Producers* was decided]. Once it became clear that the cases extending constitut[illegible]mu-nity against taxation to private pers[illegible] no longer to be followed, Congress was no[illegible]d to take affirmative action to remove an i[illegible] from the lessees of Indian lands when that [illegible]y no longer existed, nor was it necessary f[illegible] to consent to the imposition of particular taxes against such lessees once the previously existing constitutional barrier was removed. Its silence during this period must be interpreted in the setting of contemporaneous judicial decisions.[35]

[34] Brief for the United States as *Amicus Curiae* in *Oklahoma Tax Commission v. Texas Company*, Oct. Term 1948, Nos. 40 and 41, at pp. 33-34, reprinted as an Addendum hereto, at pp. 22a-23a.

[35] The 1938 Act cannot be given preemptive effect on the basis that State taxation somehow affects the Tribes' power to tax the oil and gas companies operating on their Reservations. The Court has already decided that the 1938 Act deals *only* with the role of an Indian Tribe "as partner in [an oil company's] commercial venture," not with its activities as a sovereign in imposing taxes. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982);

C. The Taxing Provisions of the 1924 and 1927 Acts Continue to Authorize State Taxation of Oil and Gas Lessees on Reservations

While the 1938 Act's lack of any preemptive effect would in itself result in sustaining New Mexico's statutes, consideration of Section 7 of the 1938 Act independently yields the same result. In that provision, Congress made clear that the 1938 Act repealed only statutes and portions of statutes inconsistent with its terms, *see* ch. 198, § 7, 52 Stat. 347. The taxing provisions of the 1927 Act and the 1924 Act, which relate specifically to oil and gas lessees, are not at odds with the 1938 Act,[36] which dealt with leasing procedures, lease terms, and the Secretary's rulemaking authority. It was as clear then as it is today that State taxes do not affect oil and gas operations or tribal royalty rates. The government had

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Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 200 (1985). *See also Rice v. Rehner*, 463 U.S. 713, 720 n.7 (1983) (activities conducted by a Tribe or its members of a commercial nature are not within the principle of tribal sovereignty), *reh'g denied*, 464 U.S. 874 (1983). Congress itself recently drew the same line in the Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871, granting Tribes exemptions from federal excise taxes if and only if they are performing essential governmental functions, as distinguished from commercial activities. *See* H.R. Conf. Rep. No. 984, 97th Cong., 2d Sess. 17 (1982).

Moreover, even if tribal sovereignty itself could preempt State law, it is not sufficient to void the taxes at issue here. State taxation of lessees and contractors of the federal government does not interfere with the sovereignty of the United States. *United States v. City of Detroit*, 355 U.S. 466, 469 (1958). That being so, it cannot be that the quasi-sovereign status of Indian Tribes, which "exists only at the sufferance of Congress" (*United States v. Wheeler*, 435 U.S. 313, 323 (1978)), shields oil and gas lessees from State taxation, particularly since the lessees' payment of State taxes results in no financial burden on the Tribes. Moreover, preemption must ultimately rest on federal law. When a Tribe passes a tax ordinance it is not enacting federal legislation and it cannot thereby oust State laws.

[36] *See* pp. 11, 12 *supra*.

so argued and the Court had agreed in *Mountain Producers*. The taxing provisions of the 1927 Act and the 1924 Act with respect to non-Indian oil and gas lessees thus remain in full force and effect.

To conclude otherwise would be to attribute contradictory purposes to the 1938 Congress. Even at the height of the immunity doctrine, congressional silence did not result in non-Indian oil and gas lessees being exempted from *all* forms of State taxes. Before *Mountain Producers*, non-Indian oil lessees had no immunity against State *ad valorem* taxes on their property and equipment, or on their share of the oil. *Taber v. Indian Territory Illuminating Oil Co., supra; Indian Territory Illuminating Oil Co. v. Board of Equalization*, 288 U.S. 325 (1933). It is ridiculous to suppose that Congress, through its silence in the 1938 Act, would have wanted to perpetuate such niceties when the Court itself had found them untenable. Yet that would be the result of ignoring the overruling of *Gillespie* and construing the 1938 Act in isolation, as if it were not building on the earlier legislation.

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985), is not to the contrary. The only question there was whether, under the 1924 and 1938 Acts, Montana could tax the Blackfeet Tribe on its royalty interests. The Court held that when it came to State taxation of Indian Tribes, two canons of construction controlled: "States may tax Indians only when Congress has manifested clearly its consent to such taxation"; and "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." 471 U.S. at 766. Therefore, "[i]n the absence of clear congressional consent to taxation," Montana could "not tax Indian royalty income from leases issued pursuant to the 1938 Act." 471 U.S. at 768.

Those two canons served as the entire rationale for the decision in *Blackfeet*.[37] But they do not apply here. There is no rule of statutory construction that ambiguities should be interpreted in favor of oil companies or requiring express congressional authorization before the States may tax them. The rule is just the opposite. Under *Mountain Producers* and the decisions following it, States may tax oil and gas producers on Indian Reservations unless and until Congress directs otherwise. Tax exemptions are not granted by implication. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973). Moreover, the fact that the 1938 Act contains a clause repealing only those portions of statutes inconsistent with it "implies very strongly that there may be acts on the same subject which are not thereby repealed". *Hess v. Reynolds*, 113 U.S. 73, 79 (1885). Repeals by implication are never favored, particularly the implied repeal of a specific statute by a more general one. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). It is therefore telling that the 1924 and 1927 Acts were directed at a specific subject—oil and gas leasing—while the 1938 Act concerned mineral leasing in general.

The conclusion is, we submit, inescapable that the taxing provisions of the 1924 and 1927 Acts continue to apply to oil and gas lessees such as appellants.

D. Contemporary Federal Policy Supports State Taxation of Oil and Gas Lessees

Appellants cannot overcome this by invoking some supposed contemporary federal policy. In the first place, the Court has made clear that regardless of "modern

[37] The Solicitor of the Department of the Interior had rendered opinions indicating that the States could tax tribal royalty interests. 471 U.S. at 762, 768 n.7; *see also* Justice White's dissenting opinion, 471 U.S. at 771-72. In 1977 he reversed himself, but, so far as we know, the Solicitor has never concluded that non-Indian oil and gas lessees are exempt from State taxes.

conditions," statutes concerning State taxation of private companies doing business with Indian Tribes must be "interpret[ed] . . . in light of the intent of the Congress that enacted them . . . ." *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 166 (1980). In the second place, recent legislation reveals a federal policy that the oil and gas companies operating on Indian Reservations should not be exempt from taxation.

In the Crude Oil Windfall Profits Tax Act of 1980, 26 U.S.C. § 4994, Congress expressly excluded from the windfall tax the royalties received by Indian Tribes and revenues from oil production *when the Tribe itself produced the oil*. However, Congress specifically determined not to exempt "oil received by non-Indian lessees of tribal interests." [38] This is a clear expression of congressional policy that oil and gas companies operating on Reservations should *not* be immune from taxation. Appellants, who were subject to the windfall tax, do not and cannot explain why Congress would want to immunize them from State taxation in order to promote tribal interests and yet subject them to federal taxes of up to 70 percent.

Moreover in 1982 Congress determined to "facilitate [the] efforts of Indian tribal governments that exercise . . . sovereign powers" [39] by permitting the taxes imposed by such Tribes to be deducted on federal tax returns. 26 U.S.C. § 7871. This is the measure Congress chose—at the urging of many Tribes—to accommodate the interests of oil and gas lessees (and others) who were beginning to be subjected to tribal taxes.[40]

[38] S. Rep. No. 394, 96th Cong., 2d Sess. 61 (1980); *see also* H.R. Conf. Rep. No. 817, 96th Cong., 2d Sess. 108 (1980).

[39] S. Rep. No. 646, 97th Cong., 2d Sess. 11 (1982). The Internal Revenue Service had previously disallowed such deductions. *See* H.R. Conf. Rep. No. 984, 97th Cong., 2d Sess. 15 (1982).

[40] *See* Subcommittee on Taxation and Debt Management of the Senate Finance Committee, *Hearings on S. 1298, S. 2197 and S. 2498*, 97th Cong., 2d Sess. (1982).

On the other hand Congress has been acutely aware of the need for States to raise revenues through taxation in order to provide essential services to Indian Reservations and the persons living there. As recently as December 1987, the Senate rejected a proposal that would have barred State taxation of certain trust land within Reservations (133 Cong. Rec. 16,949-16,956 (1987)). A few weeks later, House and Senate conferees called upon the General Accounting Office to conduct a study of "*the existing costs in services provided to Reservation residents by the State, county and local governments.*" H.R. Conf. Rep. No. 100-490, 100th Cong., 1st Sess. 292 (1987) (emphasis in original). *See* note 8 *supra.*

In short, there is not now and there has never been any federal policy that oil and gas companies operating on Indian Reservations should be exempt from State taxes. Quite the contrary. During the last half century, the federal policy expressed by all three branches of government has been that such companies should not be exempt from State taxation.

III. APPELLANTS' COMMERCE CLAUSE ARGUMENTS ARE UNTENABLE

Even if a Tribe were considered a State under the Commerce Clause—a result we believe completely untenable [41]—the State taxes here would not violate the "negative implications" of that constitutional provision. "Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154

[41] Indian Tribes are not States under the Interstate Commerce Clause, nor are their Reservations. The text of the Commerce Clause proves as much. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143 ("Tribal reservations are not States . . . ."). It is, moreover, senseless to say that the Jicarilla Tribe should be considered a State under the Constitution and then to require the State of New Mexico to provide services to it and its members. One State does not build roads and highways and maintain schools for another State.

(1982). Here Congress has acted, not only in the 1938 Act, but also in the 1924 Act and the 1927 Act, which reflect Congress' view that States have a sufficient nexus with oil and gas operations on Indian Reservations to impose taxes on the private companies who conduct them.

While this sufficiently disposes of appellants' Commerce Clause arguments, we hesitate to leave the subject without discussing the test appellants propose for determining whether the State taxes are valid. Underlying their arguments is a thoroughly discredited theory of taxation.

"Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232, 1245 n.21 (1987).[42] "No one," that is, except the appellants in this case. They contend that the State taxes collected from them and other oil companies operating on the Reservation must be in proportion to the costs of State services provided on the Reservation to them and members of the Tribe. That contention, if adopted, would thrust Reservations and States across the country into a perpetual state of massive and intractable litigation and would present State governments and courts with an administrative nightmare.

The immunity appellants desire rests on their unproven theory that by taxing them, the State is burdening the Tribe. Even if that were so, appellants' *quid pro quo* theory is flawed from the start. Their theory demands that they quantify the supposed financial effect on the Tribe, rather than measuring burdens by calculating the

[42] *See Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522-23 (1937) ("A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. . . . A corporation cannot object to the use of the taxes which it pays for the maintenance of schools because it has no children.").

amount of taxes they pay to the State.[43] The two are not the same.

Furthermore, appellants confine their calculations to expenditures "on the Reservation," but they never explain why. State benefits to tribal members, indeed to any State citizen, are not restricted to the geographical area within which they reside. They, like their non-Indian counterparts, may attend State colleges, travel to and from the Reservation on State highways, and visit State parks, recreation facilities and libraries. State government is maintained for the benefit of all citizens of the State, Indian and non-Indian alike. If an assessment were possible, one would have to allocate to tribal members some portion of all State expenditures, from the maintenance costs for the State capitol building to the costs of the books in the State college library. The enormity of such an undertaking is apparent.

While appellants measure the value to them of State benefits on the basis of State expenditures on the Reservation, that too cannot be the proper yardstick. They ignore, for example, the value to them of the State highway, without which they could not travel to the Reservation or transport the oil they produce there. Value should be calculated not on the basis of the State's costs of building and maintaining that highway, but by determining what it would cost appellants to provide transportation without it. If appellants' theory had any validity, such calculations would have to be done for the value of all State benefits available to them (and the Tribe). How this would be done is far from clear. What value, for instance, should be placed on State court systems and administrative agencies, which oil companies use to resolve

[43] Moreover, the amount of State taxes appellants pay does not even represent the financial burden on them because they presumably deducted those taxes on their federal income and windfall profits tax returns. If State taxes were eliminated, the oil companies would wind up paying more in federal taxes.

their disputes on the Reservation and off?[44] What dollar amount represents the value to appellants of the existence of a trained workforce—the accountants, the lawyers, the geologists, the oil field service workers, the contractors and so forth—which State government makes possible and without which appellants could not conduct business?

There are still other problems with appellants' idea. Oil prices fluctuate widely and, with those fluctuations, the amount of taxes collected will vary from month to month and year to year. Under appellants' *quid pro quo* theory, State legislatures would have to sit in constant session in order somehow to adjust tax rates on Reservation oil companies so that benefits will equal burdens at year end. Moreover, appellants never explain why even the flawed calculations they contemplate should be done on a yearly basis. State expenditures in a particular geographical area are not constant. In one year a new school may be needed; in another, new roads may have to be constructed or old roads replaced. If State expenditures exceed collections in one year, we assume appellants would have no complaint. Does this mean that in the next year, if tax collections exceed expenditures, State taxes suddenly become invalid regardless of shortfalls in the past?

Judicial determinations of these matters will necessarily be after-the-fact, indeed years later in light of the enormity of the factual investigation that would have to be performed. The consequent disruption of State budgeting processes and the financial disarray and uncertainty this would cause in the affected States would be

[44] One of the most massive State administrative proceedings on record took place in Utah when oil companies operating on the Navajo Reservation became embroiled in disputes concerning well spacing there. *See* Clyde & Dewsnup, *The Aneth Spacing Order: A Case Study of Administrative Regulation*, 7 Utah L. Rev. 16 (1960); *see also* F. Cole, *Well Spacing in the Aneth Reservoir* (1962), considered in the oil industry to be the classic text on well spacing.

intolerable. States often impose a variety of taxes at different rates on oil companies. If a State expended $10 million on a Reservation and collected a total of $20 million in taxes during a certain period, do appellants believe that all State taxes should be declared invalid so that the State's non-Indian citizens must make up the difference? Or do they believe a court should invalidate only $10 million of the State taxes, choosing for itself whether to reach this number by striking down the severance tax or the *ad valorem* tax or the oil and gas conservation tax or the sales and use tax? Whatever their view, appellants believe that they—not the Tribe—would be entitled to recover from the State. Yet appellants would not be bound to spend their tax refunds on the Reservation; they would be free to declare a stock dividend, provide bonuses to their executives, invest in drilling equipment here and abroad, or simply put their windfall in the bank. None of that of course would be of any benefit to the Tribe.

Appellants finally reveal the true nature of their stance when they contend that the Court should order the State to give them a tax credit for tribal taxes. We contend that oil companies must make such proposals to the State legislature or, better yet, to Congress, which could mollify their complaint about multiple taxation by giving them a credit for State or tribal taxes on their federal income tax returns.

As the Court stated in *United States v. City of Detroit*, 355 U.S. 466, 474 (1958), "[w]ise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty. Such complex problems are ones which Congress is best qualified to resolve." That is a lesson learned years ago with respect to oil and gas lessees seeking immunity from State taxes because they were conducting operations on Indian Reservations.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of New Mexico should be affirmed.

Respectfully submitted,

DAVID L. WILKINSON
Attorney General
MICHAEL M. QUEALY
Assistant Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114

ROBERT K. CORBIN
Attorney General
ANTHONY B. CHING
Solicitor General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007

DUANE WOODARD
Attorney General
State of Colorado
1525 Sherman Street
Denver, Colorado 80203

ROBERT A. BUTTERWORTH
Attorney General
State of Florida
The Capitol
Tallahassee, Florida 32399

MICHAEL T. GREELY
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401

ROBERT H. HENRY
Attorney General
State of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105

KENNETH O. EIKENBERRY
Attorney General
State of Washington
7th Floor
Highway Licenses Building
Olympia, Washington 98504

A. RAYMOND RANDOLPH *
Special Assistant Attorney
General for the State of Utah
BRUCE R. STEWART
PEPPER, HAMILTON & SCHEETZ
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

JOHN K. VAN DE KAMP
Attorney General
JAMES B. CUNEO
Deputy Attorney General
State of California
350 McAllister Street
Suite 6000
San Francisco, California 94102

THOMAS J. MILLER
Attorney General
State of Iowa
The Capitol
Hoover Building
Des Moines, Iowa 50319

JOSEPH B. MEYER
Attorney General
State of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

NICHOLAS J. SPAETH
Attorney General
State of North Dakota
State Capitol
Bismarck, North Dakota 58505

ROGER A. TELLINGHUISEN
Attorney General
State of South Dakota
State Capitol Building
Pierre, South Dakota 57501

DONALD J. HANAWAY
Attorney General
State of Wisconsin
114 East State Capitol
Madison, Wisconsin 53707

* Counsel of Record

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ADDENDUM

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EXCERPTS FROM THE FEDERAL GOVERNMENT'S BRIEF FOR THE PETITIONER IN *HELVERING v. MOUNTAIN PRODUCERS CORP.*, 303 U.S. 376 (1938):

* * * *

[31] 2. This Court has expressly rejected each of the premises advanced in the *Gillespie* and *Coronado* cases to justify the grant of tax immunity to the private operator of an oil lease of government lands.

a. In the *Gillespie* case the Court refused to accept the contention that a net income tax on the lessee produced but a slight or problematic effect upon the lessor State. It put aside the interstate commerce cases [7] on the ground that "the rule as to instrumentalities of the United States on the other hand is absolute in form and at least stricter in
[32] substance" (257 U.S. at 505). But in *James* v. *Dravo Contracting Co.*, No. 3, October Term, 1937 (pamph. p. 17), this Court has not only rejected but has reversed this rule, and has held that a gross income tax upon the receipts of a government contractor is valid even though such a tax upon receipts derived in interstate commerce would be invalid.

b. The main ground of the decision in the *Gillespie* case was that "a tax upon such profits is a direct hamper upon the efforts of the United States to make the best terms it can for its wards" (257 U.S. at 506). But obviously the taxation would not force the government to accept an offer to lease the lands which would be less attractive than otherwise would be the case except so far as it operated to reduce the amount of the royalty offered. The effect of taxing the lessee was, accordingly, supposed to be reflected in the *price* received by, as opposed to *interference* with, the sovereign. This ground for conferring tax immunity has frequently been rejected in

[7] *Peck & Co.* v. *Lowe*, 247 U.S. 165, 175; *U.S. Glue Co.* v. *Oak Creek*, 247 U.S. 321; *Shaffer* v. *Carter*, 252 U.S. 37, 57.

subsequent decisions of this Court. If a net income tax on the lessee lowers the price received by the government, so too it increases the cost to the government when imposed on its contractors. But such a tax is valid. *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, *General Construction Co.* v. *Fisher*, 295 U.S. 715. A tax on the sale of goods to the government contractor is valid, even though it must operate to increase the cost of the sovereign. *Trinityfarm Co.* v. *Grosjean*, 291 U.S. 466; *Tirrell*
[33] v. *Johnston*, 293 U.S. 533, cf. *Henneford* v. *Silas Mason Co.*, 300 U.S. 577. A tax on the manufacture or transportation increases the cost to the purchasing sovereign, but is nonetheless valid. *Wheeler Lumber Co.* v. *United States*, 281 U.S. 572; *Liggett & Myers Co.* v. *United States*, 299 U.S. 383. Even more certainly is the cost to the sovereign increased by a gross receipts tax on the contractor's income. Yet such taxes are valid. *Alward* v. *Johnson*, 282 U.S. 509; *James* v. *Dravo Contracting Co.*, *supra*. In the latter case the Court expressly recognized (pamph. pp. 18-19) the probability of added cost to the Government. Finally, the language of this Court in the *Group No. 1* case is fully as applicable to this lease as to that which technically was a "sale" of the oil in place. The Court there said (p. 282):

> We may assume that if the property is subject to tax after sale, the governmental seller will generally receive a less favorable price than if it were known in advance that the property in the hands of later owners, or even of the buyer alone, could not be taxed.
>
> But the remote and indirect effects upon the one government of such a non-discriminatory tax by the other have never been considered adequate grounds for thus aiding the one at the expense of the taxing power of the other. * * *

c. In the *Coronado* case, while relying chiefly upon the *Gillespie* case, the Court advanced another
[34] reason for the immunity. It said (285 U.S. at 400-401):

> Here the lease to the respondent was an instrumentality of the State for the purpose of carrying out her duty in respect of public schools. To tax the income of the lessee arising therefrom would amount to an imposition upon the lease itself.

But since that decision this Court has expressly disapproved the proposition that a tax on the income is a tax on the source. In *New York ex rel. Cohn* v. *Graves*, 300 U.S. 308, the Court sustained a New York tax on the income derived by its resident from New Jersey real estate. This was because "income is not necessarily clothed with the tax immunity enjoyed by its source" (p. 313). And in *James* v. *Dravo Contracting Co.*, *supra*, the Court sustained a tax on the *gross* income of a government contract, expressly stating (pamph. p. 10) that "the tax is not laid upon the contract of the Government."

d. Although not explicitly advanced, it might be thought that the *Gillespie* and *Coronado* cases rest on a general principle that income derived by virtue of a government license, or from government property, is exempt, irrespective of any actual cost or ascertainable interference with the government. *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, sustaining a state tax on income realized under a copyright, is a sufficient answer to the first suggestion. And since the oil, from the moment it is extracted, is no
[35] longer the property of the State, this case differs in no manner from the usual case of resale of property purchased from the government. Income derived on such a resale, of course, is not tax exempt. *Group No. 1 Oil Corp.* v. *Bass*, *supra*, 282.

No other reason advanced by the Court as the ground for the decisions in the *Gillespie* and *Coronado* cases has been discovered. Each of the premises relied on in those cases has expressly been rejected by subsequent decisions of this Court.

Moreover, the rule of the *Gillespie* and *Coronado* cases seems directly contrary to the decision in *Indian Territory Oil Co.* v. *Board*, 288 U.S. 325. There this Court sustained an *ad valorem* tax on oil, extracted under a lease of Indian lands, which was stored after payment of the agreed royalties. It said (p. 328):

> Such immunity as petitioner enjoyed as a governmental instrumentality inhered in its operations as such, and being for the protection of the Government in its function extended no farther than was necessary for that purpose. The holding of the oil in question, which had been segregated and withdrawn from the restricted lands as petitioner's exclusive property, awaiting disposition at petitioner's pleasure, was for its sole advantage and cannot be said to be so identified with its operations as a governmental instrumentality as to entitle it to exemption from the general property taxes imposed by the State in return for the protection the State afforded.
>
> * * *

[36] At least where, as in this case, the royalties are paid in kind, a precisely comparable situation is present in the case of the income tax. The lessee first extracts the oil. At the mouth of the well he delivers the oil to the lessor. The remaining oil is his absolute property. Under the *Indian Territory* case, he is subject to a property tax on this oil. No reason is apparent why he should not also be subject to an income tax.[8]

[8] It is true that the deductions from gross income reach back into the period prior to the payment of the royalty. But it is not the deductions, allowed as a matter of grace, but the income which is taxed; this is realized only after payment of the royalties.

If there were any doubt that this rule is equally applicable to an income as to a property tax, it would be removed by the decision of this Court in *Peck & Co.* v. *Lowe*, 247 U.S. 165. There the express constitutional prohibition against a tax "on articles exported from any State" (Art. I, Sec. 9, cl. 5) was held inapplicable to a tax on the income derived from export sales.[9] This Court said (pp. 174-175) of the income tax there in question:

> It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or accruing from all sources." There is no
> [37] discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. * * *

3. It is unnecessary to dwell upon the fact that maintenance of tax revenues is a matter of imperative importance both to the States and the Nation (*supra*, p. 24). Similarly, it is unnecessary to elaborate the unfortunate consequences which flow from a division of private competitors into taxable and tax-exempt classes; there inevitably develop conditions of special advantage, dissatisfaction, and general lack of confidence in the equity of taxing systems. It is for these reasons that this Court has so often announced that it would hold unconstitutional only those taxes which contain a real and substantial threat to the maintenance of that independence of the

[9] The decision in *Liggett & Myers Co.* v. *United States*, 299 U.S. 383, relying on *Cornell* v. *Coyne*, 192 U.S. 418, shows that taxation permitted under clause 5 of Section 9 of Article I is equally permitted under the implied prohibition against intergovernmental taxation.

States or the Nation which is essential to our dual system of government.[10]

The power to tax the income realized by the lessee of government lands in no sense contains a threat to this necessary independence of the nation and the states. The government lessor remains
[38] wholly free to lease or not, as it chooses. It may prescribe the terms of the lease with the same freedom which it otherwise would have. It may, as fully as though the lessee were tax exempt, use the proceeds for whatever purpose it desires.

The only possible effect upon the government lessor is that the sovereign would lose an advantage now possessed, in that oil and mineral operators would no longer be more anxious to lease from the government than from a private lessor. This is a very doubtful conclusion. The overwhelming consideration in such leases, typically, may be supposed to be the gamble as to the quantity and ease of extraction of the oil or mineral which is in place underground. If the development is successful, the profits usually will be larger than in the ordinary business enterprise. It seems most unlikely that the typical lessee would substantially reduce the terms he offers the government lessor if he knew that his net income would be subject to taxation. His decisions are shaped by geologic rather than cost accounting estimates.

But even if it be assumed that occasionally or even generally the government lessor would receive a somewhat larger royalty if the lessee were exempt from an income tax on his profits from the lease, this in no sense

[10] *Helvering* v. *Powers*, 293 U.S. 214, 225; *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292 U.S. 360, 368-369; *Board of Trustees* v. *United States*, 289 U.S. 48, 59; *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 523; *Indian Territory Oil Co.* v. *Board*, 288 U.S. 325, 328; *Willcuts* v. *Bunn*, 282 U.S. 216, 225; *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 391; *National Bank* v. *Commonwealth*, 9 Wall. 353, 362.

invalidates the tax. The independence of the government does not require that it receive a *special* advantage in the market place. A non-discriminatory tax upon the income of lessees of mineral lands, even though it were to reduce [39] somewhat the revenues of the government lessors, is wholly irrelevant to the governmental functions either of the States or the Nation. If this Court were so to hold, it is submitted that its decisions would be made more consistent, that the doctrine of intergovernmental tax immunity would be brought more nearly into line with its reasons, that the revenues of the central and the local governments would be augmented, and that the undesirable and special privilege of tax immunity now extended to certain of the competing oil and mineral operators would be eliminated.

* * * *

EXCERPTS FROM THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN *JAMES v. DRAVO CONTRACTING CO.*, 302 U.S. 134 (1937):

* * * *

[34] The basis of the doctrine of intergovernmental tax immunity is that our dual system of government demands that both the state and national government be free from *interference* from the other. *Railroad Company* v. *Peniston*, 18 Wall. 5, 36-37; *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 128. We have indicated that a tax upon a contractor, the sole result of which is to increase the cost to the sovereign by the amount of the normal tax burden, presents no interference with its operations. But it may be that a state will some time cast a regulatory measure in the form of a tax, which though it be non-discriminatory, may affect the performance of a Federal contractor.[14] The validity of such a regulation, if attempted directly without the use of the tax device, would depend upon the circumstances. (See pp. 45-47, *infra.*) Where a direct regulatory measure would be unconstitutional, it should similarly be invalid if enacted in the guise of a tax. No State can apply a tax in a manner such as to conflict with the performance of a federal function.

* * * *

[44] We think it evident that once we pass beyond the simple criterion of whether or not the Government itself must pay the tax, and subject itself to the tax collection machinery of the State, there can be no satisfactory distinction between the types of taxes which are sought to be imposed upon the private persons who deal with the sovereign. Since the question turns solely upon the effect

[14] Conceivably, situations might arise in which it would be difficult to determine whether the tax was regulatory or merely one somewhat higher than might normally be expected. Such a situation, plainly rather remote and conjectural, may be met when it arises, if ever.

upon the sovereign, and since all taxes, in varying degrees, have this effect, we submit that the doctrine can have a rational and fair application only if all of these taxes are held to be within the taxing power of the Government, whether it be the Nation or the State. The attempt to distinguish between the varying types of taxes imposed on private persons, according as they interfere with the sovereign, is to perpetuate a rule which has proved to be unsatisfactory and inconsistent.

EXCERPTS FROM THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN *OKLAHOMA TAX COMMISSION v. TEXAS CO.*, 336 U.S. 342 (1949):

* * * *

[17] The immunity of these lands from taxation was further extended to non-Indian lessees of the land and to their income derived from the land. See the remarks of Justice Black in *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 603-604. Thus, in invalidating the original Oklahoma gross production tax as applied to a lessee of restricted Indian lands in *Choctaw & Gulf R.R.* v. *Harrison*, *supra*, the lessee was regarded as the "instrumentality" employed by the Federal Government, and was ruled to be exempt from the tax which the Court considered as being tantamount to an occupational tax. In *Indian Oil Co.* v. *Oklahoma*, 240 U.S. 522, it was the lease itself which was regarded as the federal instrumentality and immune from a direct property tax, it being reasoned that (p. 530)—

[18] A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.

The *Choctaw & Gulf R.R.* and *Indian Oil Co.* cases, *supra*, were the only authorities relied on in the *per curiam* dispositions of *Large Oil Co.* v. *Howard* and *Howard* v. *Gipsy Oil Co.*, *supra*, where the later enactments of the gross production tax were held invalid with respect to lessees of restricted lands.

The theory of an implied constitutional immunity as extended to such lessees roughly paralleled that accorded to private contractors of the Government where the rationale was also in terms of "instrumentality" and "the power to destroy." See *Williams* v. *Talladega*, 226 U.S. 404. It reached its culmination in *Gillespie* v. *Oklahoma*, 257 U.S. 501, which denied the State of Oklahoma the

power to impose a net income tax on the non-Indian lessee's income derived from restricted Indian lands. The Court there arrived at its decision by relying on the previous rules invalidating the gross production tax and the *ad valorem* tax on the lease itself, stating (p. 506):

> The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards.

[19] The *Gillespie* case, as was true of *Indian Oil Co.* v. *Oklahoma* and *Choctaw & Gulf R.R.* v. *Harrison*, *supra*, was decided on the ground that the lessee or the lease was an instrumentality selected by the Federal Government to effectuate its policy toward the restricted lands of the Indians. The same doctrine was applied and the *Gillespie* decision was followed in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393,[8] where it was held that the federal income tax could not be applied to a lessee of oil lands of the State of Oklahoma, it being said (pp. 400-401):

> To tax the income of the lessee * * * would amount to an imposition upon the lease itself.

The infirmity of the grounds on which this constitutional immunity rested had become fully apparent (See *James* v. *Dravo Contracting Co.*, 302 U.S. 134, and the cases cited *supra*, fn. 8) when *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, again raised the question

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[8] Decisions subsequent to the *Gillespie* case had already made great inroads in the doctrine of implied immunity. *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514; *Willcuts* v. *Bunn*, 282 U.S. 216; *Alward* v. *Johnson*, 282 U.S. 509; *Group No. 1 Oil Corp.* v. *Bass*, 283 U.S. 279. These decisions, and others, convinced the four Justices who dissented in the *Coronado* case that the *Gillespie* decision ought to be overruled.

of the authority of the Federal Government to impose a net income tax on a lessee of state-owned oil lands. Upon a reexamination of the matter, it was there held that [20] no constitutional barrier stood to deny Congress the power to impose the tax;[9] after determining that *Burnet* v. *Coronado Oil & Gas Co., supra,* and *Gillespie* v. *Oklahoma* were incorrectly decided, both cases were expressly overruled.

The direct repudiation of those cases meant more than a reversal of decisions respecting the imposition of a net income tax on private lessees. It, together with the consistent course of decisions since *James* v. *Dravo Contracting Co.,* 302 U.S. 134, marks the complete destruction of the principles on which these lessees were once held immune from non-discriminatory taxation on their property or income. This conclusion seems to have been shared by both the majority and dissenting opinions in *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598, 603-604, 615.

If nothing more, the fact that the *Gillespie* case had strictly followed the reasoning of the *Choctaw & Gulf R.R.* and *Indian Oil Co.* opinions, and had also strongly relied on the *Gipsy Oil Co.* and *Large Oil Co.* decisions, would be most persuasive that all those authorities fell along with *Gillespie,* even though it was not necessary to the decision in *Mountain Producers* that they be expressly overruled at that time.

The very basis of the decision in the *Mountain Producers* case was to deny the proposition that
[21] a non-discriminatory tax on a Government contractor or lessee imposed a burden which caused an unconstitutional interference with the Government; the opinion stated (303 U.S. at 386-387):

> * * * that immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote.

The decisions which invalidated the gross production and property taxes for the reason that the taxation of the lessee would burden the tax exempt Indian lands and hamper the policy of the Government toward its Indian wards were as clearly "out of harmony with correct principle" (303 U.S. 376, 378) as was *Gillespie* v. *Oklahoma, supra,* in applying the same erroneous concepts.

The lessees here can derive no comfort in their assertion of immunity on the ground that *Mountain Producers,* by overruling *Gillespie,* has only authorized the State to tax their *net income* from
[22] operations under the leases, and that the taxes here are measured by *gross income* from production and by the *amount of production.* The difference between a tax on gross receipts and net earnings has been recognized as not being "controlling" (*James* v. *Dravo Contracting Co.,* 302 U.S. at 158), for once the "burden" theory had been discarded such a distinction was no longer valid (see *Helvering* v. *Gerhardt,* 304 U.S. 405, 420-422, and *Graves* v. *N.Y. ex rel. O'Keefe,* 306 U.S. 466, 480, 487). The decisions actually demonstrate that no difference is to be drawn between a tax measured by gross receipts, gross production, or net income; so long as the tax is non-discriminatory and the legal incidence is placed on the Government contractor or on his property, no constitutional immunity may be successfully asserted. *James*

[9] Accord: *Helvering* v. *Bankline Oil Co.,* 303 U.S. 362.

v. *Dravo Contracting Co., supra*, and *Mason Co.* v. *Tax Commission*, 302 U.S. 186 (state gross receipts tax on contractor with Federal Government); *Atkinson* v. *Tax Commission*, 303 U.S. 20 (state net income tax on contractor with Federal Government); *Alabama* v. *King & Boozer*, 314 U.S. 1 (state sales tax on sales to cost-plus contractor with Federal Government); *Curry* v. *United States*, 314 U.S. 14 (state "use" tax on materials used by cost-plus contractor with Federal Government); *Wilson* v. *Cook*, 327 U.S. 474 (state severance tax imposed on contractor who severed and purchased timber from United States lands). See also Powell, *The Waning of Intergov-*
[23] *ernmental Tax Immunities*, 58 Harv. L. Rev. 633, 640-641, 657-659 (1945).

The other, but closely related foundation of the *Choctaw & Gulf R.R., Indian Oil Co., Gipsy Oil Co.* and *Large Oil Co.* decisions, namely, that the lessee or lease is an "instrumentality" of the Government which enjoys a constitutional immunity from non-discriminatory taxation, is .lso discarded doctrine. Such is the plain teaching of the cases. *Metcalf & Eddy* v. *Mitchell, supra*; *James* v. *Dravo Contracting Co., supra*; *Mason Co.* v. *Tax Commission, supra*; *Atkinson* v. *Tax Commission, supra*; *Helvering* v. *Bankline Oil Co., supra*; *Helvering* v. *Mountain Producers Corp., supra*; *Buckstaff Co.* v. *McKinley*, 308 U.S. 358; *Alabama* v. *King & Boozer, supra*; *Curry* v. *United States, supra*; *Wilson* v. *Cook, supra*. See *United States* v. *Allegheny County*, 322 U.S. 174, 186.

If there were even the slightest doubt as to what the *Mountain Producers* decision meant with respect to the kind of taxes involved in these cases, their validity would be automatically established by *Wilson* v. *Cook, supra*. There the State of Arkansas imposed a severance tax which was measured by the amount of timber severed. It was held that the taxpayer, who, under contract with the Federal Government, was engaged in cutting and purchasing timber from national forest reserves, was not immune from the tax, the Court saying (327 U.S. at 482-483):

> [24] Our decision in *James* v. *Dravo Contracting Co., supra*, and in *Alabama* v. *King & Boozer, supra*, and the cases cited in those opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, who are taxed by the state on their activities in severing lumber from Government lands under contract with the Government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state.

The taxes involved in the present cases cannot be successfully distinguished from those imposed in *Wilson* v. *Cook, supra*. The taxpayers here are engaged in taking natural resources from restricted Indians lands and the taxpayer in *Wilson* v. *Cook, supra*, was so engaged with respect to lands belonging to the United States. In both situations the tax is levied in direct proportion to the amount of the natural resources which has been severed. The effect of the taxes on the United States here, where the beneficial ownership of the lands and the royalties is in the Indians, is even more remote than that considered in *Wilson* v. *Cook, supra*, so that the present cases are *a fortiori* situations for the denial of any immunity to the private lessees.

In the final analysis, the question is whether these taxpayers, who are engaged in the business of exploiting the resources from restricted lands for their own individual profit, and who enjoy the
[25] benefits of state and local government, are to be excused from contributing through the gross production tax to the costs of such government, and from paying through the petroleum excise tax their fair share of the costs of a conservation program in which they derive a direct and immediate benefit. Since the Constitution does not require that such an extraordinary, preferred status

be accorded to lessees or contractors of the United States, there is even less reason to suppose that a different result is to obtain where the Government's financial interest is not directly involved. See *Helvering* v. *Mountain Producers, supra*.

It is submitted, accordingly, that *Choctaw & Gulf R.R.* v. *Harrison, supra; Howard* v. *Gipsy Oil Co., supra*, and *Large Oil Co.* v. *Howard, supra*, are directly contrary to the more recent decisions of this Court and should be expressly overruled.

While the foregoing considerations sufficiently demonstrate the constitutional validity of these taxes, it may be appropriate to observe that there are added reasons for sustaining the gross production tax. This tax, so far as the lessees are concerned, is in lieu of any other *ad valorem* taxes on their property rights and investment in the minerals, mineral rights, producing leases, and machinery and equipment used in and around any well. Also, by appropriate proceedings, the gross production tax may be raised or lowered to make it conform to what the *ad valorem* taxes would have
[26] been if imposed on such property in the first instance. See *supra*, pp. 9-13.

The decisions in *Howard* v. *Gipsy Oil Co., supra*, and *Large Oil Co.* v. *Howard, supra*, as previously indicated, considered that it made no difference whether the gross production tax was in lieu of other *ad valorem* taxes, or was in addition to such taxes (as had been true of the statute involved in the *Choctaw & Gulf R.R.* case). See *Gillespie* v. *Oklahoma*, 257 U.S. at 504-505. The *Gipsy Oil* and *Large Oil* cases, however, are contrary to the later decision in *Alward* v. *Johnson*, 282 U.S. 509, where a state gross receipts tax levied in lieu of *ad valorem* taxes was sustained, even though a portion of the taxpayer's gross receipts was derived from a contract with the Post Office Department to transport the United States mail.

The lessees, here, as was true of the taxpayer in the *Alward* case, own property used in carrying on a business for profit. That property could be taxed through a direct property tax. *Taber* v. *Indian Territory Co.*, 300 U.S. 1 (sustaining the Oklahoma *ad valorem* tax on the property and equipment of a lessee of restricted Indian lands); *Indian Territory Oil Co.* v. *Board*, 288 U.S. 325 (upholding the Oklahoma *ad valorem* tax on the lessee's share of oil produced under a lease of restricted lands); *Curry* v. *United States, supra* (holding valid a "use" tax on materials purchased by a con-
[27] tractor to carry out a construction contract for the United States).

Since Oklahoma could undoubtedly exact from these lessees their fair share of support for the cost of state and local government by means of a nondiscriminatory tax on their property used in producing the oil and gas under the leases, it seems reasonable that the same essential obligations can be required from them even though the tax, in the first instance, is measured by their share of the gross production. While the State of Oklahoma has found it more feasible to tax the property used in this industry through the means of a gross production tax, which is subject to revision in accordance with *ad valorem* standards, the effect on the United States or on its Indian wards is not any different than would be true if a simple *ad valorem* tax were employed. *Alward* v. *Johnson, supra*, established the validity of this kind of tax even before the *Dravo* decision and the cases following it denied any constitutional immunity to private contractors and lessees. Its authority today is beyond question.

The court below, however, believed that *Indian Oil Co.* v. *Oklahoma*, 240 U.S. 522, which had held that a lease of restricted Indian lands was an "instrumentality" of the Federal Government whose value could not be reached by a state *ad valorem* tax, was a binding precedent which compelled the

[28] conclusion that the lessees here were immune from the gross production and petroleum excise taxes.[10] Even if the actual decision in the *Indian Oil Co.* case could still be regarded as controlling with respect to the taxation of the lease itself, a proposition with which we cannot agree, it could not stand for the conclusion that the lessees are "instrumentalities" who are exempt from the taxes here involved, as must be apparent from the previous discussion. Further, the gross production taxes in these cases present no issue concerning the validity of taxing the value of the lease, for no question has been raised, through the appropriate statutory procedure, to test the amount of the gross production tax in comparison to what the *ad valorem* taxes would have been on the taxpayer's property exclusive of the lease.[11]

However, if this is deemed to be an appropriate opportunity, we believe that *Indian Oil Co.* v. *Okla-*
[29] *homa, supra,* ought also to be overruled. Since the State can validly tax the value of physical property used by such a lessee or by a Government contractor *Taber* v. *Indian Territory Co., supra; Indian Territory Oil Co.* v. *Board, supra; Curry* v. *United States, supra*), and may even tax the value of an outstanding claim against the United States due on an open account (*Smith*

[10] The *Indian Oil Co.* case was also relied on in the *per curiam* decisions in *Howard* v. *Gipsy Oil Co.* and in *Large Oil Co.* v. *Howard, supra.*

[11] Seeking to conform to the *Indian Oil Co.* decision, and while still attempting to uphold the gross production tax on the lessee of restricted lands, the Oklahoma Supreme Court in *In re Skelton Lead & Zinc Co.,* 81 Okl. 134, 149, intimated that in making the comparison between the amount of the gross production tax and the *ad valorem* tax, it would not be proper to include the value of the lease in the property subject to tax. Since there is nothing in the Oklahoma statute compelling such a result, the express overruling of the *Indian Oil Co.* case would leave the question open to Oklahoma for decision, unembarrassed by an infirm precedent of this Court.

v. *Davis,* 323 U.S. 111), no firm reason can exist why the State should not be able to impose a non-discriminatory tax with respect to the value of the lease or of the contract itself, either through a direct tax or by a gross production tax which is in lieu of other property taxes. The effect which such a non-discriminatory tax would have on the United States, where it is the immediate party in interest, or on its Indian wards, where leases to restricted lands are involved, is certainly no more direct or burdensome than that resulting from a tax on the lessee's physical property, or on his gross income, or on the value of his claim against the United States. We believe that *Indian Oil Co.* v. *Oklahoma, supra,* was wrong in holding that the value of such a lease could not be taxed the same as other property, and should no longer be regarded as an authoritative precedent.

B. No Statutory Immunity Has Been Created

Since the lessees do not possess a constitutional immunity which, itself, would exempt them from non-discriminatory taxes measured by their gross
[30] receipts or gross production, it remains to be considered whether Congress has cloaked them with an immunity which they would not otherwise enjoy. If it believed that this would have a beneficial effect on the affairs of its Indian wards, and if it saw fit to pursue such a policy, Congress could undoubtedly exempt these lessees against the taxes which are here in issue. See *James* v. *Dravo Contracting Co., supra,* pp. 160-161; *Pittman* v. *Home Owners' Corp.,* 308 U.S. 21, 32-33; *Maricopa County* v. *Valley Bank,* 318 U.S. 357, 361; *Board of Comm'rs* v. *Seber,* 318 U.S. 705, 715-719; *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598; *Mayo* v. *United States,* 319 U.S. 441, 446; *Smith* v. *Davis, supra,* pp. 116-119. The question is whether Congress has actually done so.

The court below, noting that in certain instances Congress had acted to withdraw immunity and to subject

certain designated restricted lands to the Oklahoma gross production tax, concluded that the lessees here were not subject to tax because Congress (No. 40, R. 37)—

> has acted on the theory that such immunity exists in the case of leases of this character unless waived.

We disagree with this reasoning and firmly believe that no conclusions can be drawn to the effect that Congress has acted so as to create an immunity for these private lessees. "The immunity formerly
[31] said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." *Oklahoma Tax Comm'n* v. *United States*, *supra*, 319 U.S. at 604.

A brief summary of the legislative action in this field will show that there is no basis for holding that Congress presently considers that any immunity is to be accorded to these oil and gas well operators. Despite the tax-exempt character of the land, there have been instances where Congress has acted to permit taxation in some respect of the mineral production and to authorize the payment of the taxes due on account of the Indians' royalty interests. This was done in the case of the Osages,[12] the Kansas or Kaws,[13] the Qua-

[12] Section 5 of the Act of March 3, 1921, c. 120, 41 Stat. 1249, authorized Oklahoma to levy its gross production tax on all oil and gas produced in Osage County and directed the Secretary of the Interior to pay the tax on the royalty interests out of the royalties received by the Osage Tribe. See H. Rep. No. 1377, 66th Cong., 3d Sess.; H. Rep. No. 1278, 66th Cong., 3d Sess.; S. Rep. No. 704, 66th Cong., 3d Sess.

In *Oklahoma* v. *Barnsdall Corp.*, 296 U.S. 521, it was held that this statute was not a consent to the imposition of the petroleum excise tax and, following the then prevailing immunity doctrine, that the lessee was exempt from the imposition of this tax.

[13] The Act of May 27, 1924, c. 200, 43 Stat. 176, consented to the imposition of Oklahoma taxes on the production of oil and gas from the restricted allotted lands of the Kansas or Kaw Indians and

paws,[14] and the Five
[32] Civilized Tribes.[15] Congressional action in this respect was prompted primarily by considerations arising from the favorable economic position of the particular Indians and by the desirability of their making a direct contribution through the specified taxes to the support of local government. See the legislative materials cited in footnotes 12-15, *supra*. The result of this Congressional action, under the then prevailing decisions, was similarly to withdraw the existing immunity of the lessees.

Congress, significantly, has never taken any positive or direct action to assert an immunity for any
[33] lessees of tax-exempt Indian lands. The legislative measures have been in the reverse direction, namely, to withdraw immunity from the Oklahoma gross production tax with respect to the restricted lands of certain Indian tribes. These enactments, moreover, all took place under a different climate of judicial decision, namely, when it

authorized the Secretary of the Interior to pay the taxes assessed against the royalties out of the funds of the particular Indians. See H. Rep. No. 269, 68th Cong., 1st Sess.; S. Rep. No. 433, 68th Cong., 1st Sess., and the letter from the Secretary of the Interior dated February 16, 1924, set forth in the Committee Reports.

[14] Section 26 of the Act of March 3, 1921, c. 119, 41 Stat. 1225, as amended by the Act of April 17, 1937, c. 108, 50 Stat. 68, consented to the levy of the Oklahoma gross production tax on lead and zinc produced from the restricted lands of the Quapaws and directed the Secretary of the Interior to pay the taxes assessed against the royalty interests out of the funds of the individual Indian royalty owners. See H. Rep. No. 431, 75th Cong., 1st Sess.; S. Rep. No. 234, 75th Cong., 1st Sess.

[15] Section 3 of the Act of May 10, 1928, c. 517, 45 Stat. 495, provided that all minerals produced from restricted allotted lands of the members of the Five Civilized Tribes should be subject to taxation the same as minerals produced from other lands. See H. Rep. No. 1193, 70th Cong., 1st Sess.; S. Rep. No. 982, 70th Cong., 1st Sess., and the letter from the Secretary of the Interior dated March 7, 1928, set forth in the Committee Reports.

appeared that the immunity would exist for the Indian lessors as well as for the private lessees unless Congress acted affirmatively to remove the exemption against taxation.

In this limited respect, it is true, Congress formerly acted on the assumption that the immunity of the lessee existed until waived by legislative action. This was so, however, only because such was the constitutional situation under the prevailing decisions. It does not follow, however, that Congress, ignoring the subsequent decisions of this Court, has tacitly made the same assumption during the past 10 years. Once it became clear that the cases extending constitutional immunity against taxation to private persons were no longer to be followed, Congress was not required to take affirmative action to remove an immunity from the lessees of Indian lands when that immunity no longer existed, nor was it necessary for it to consent to the imposition of particular taxes against such lessees once the previously existing constitutional barrier was removed. Its silence during this period must be interpreted in the setting of the contemporaneous
[34] judicial decisions. *Mayo* v. *United States, supra,* 319 U.S. at 447-448.

We believe that Congress, by failing to make specific provision for the taxation of the lessees here, has not indicated any intention that they should be exempt from taxation on their activities. The situation is similar to the silence of Congress during the time that the *Gillespie* decision stood for the existence of the lessee's immunity against a state net income tax. The *Mountain Producers* case demonstrates that no significance should be attached to this, for the tax exemption there, quite properly, fell along with the constitutional doctrine, unchecked by notions of legislative intent that could only have been fabricated out of Congressional inaction. Surely, the failure of the legislature to mark its disagreement with constitu-

tional decisions does not signify an adoption of those opinions as the policy of the law makers which will persist beyond the time that they are overruled.

Nor is the existence of a statutory exemption from taxation to be inferred from the fact that Congress has seen fit to consent to taxation of the mineral production from the lands of certain Indians but has not done so in the case of others. Differences in legislative policy respecting the taxation of the various Indian tribes do not add up to similar differences in policy towards their private lessees. The retention of whatever immunity at-
[35] taches to the royalty interests of the lands involved in this case is not at all inconsistent with the lessees' being taxed on their income or on their share of production. The situation is parallel to that where the express retention of the tax immunity of the United States does not spell out an exemption for private persons who may have a direct association with the Government.

If the *non-sequitur* of the reasoning f the lower court were not otherwise apparent, it would become so by a consideration of the incongruous intentions imputed by it to Congress. Thus, it has never been intimated that the action of Congress outlined above or its silence in other respects gave any lessees a statutory immunity against *ad valorem* taxes on their property and equipment, or on their share of the oil. *Taber* v. *Indian Territory Co., supra*; *Indian Territory Oil Co.* v. *Board, supra.* Actually, Congress has acted on the supposition that such legislative immunity does not exist.[16] Also,

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[16] The Act of February 14, 1931, c. 179, 46 Stat. 1108, amended the Act of May 10, 1928, *supra*, to provide against any double taxation and to provide that where the machinery and equipment was taxed on an *ad valorem* basis for the fiscal year ended June 30, 1931, the gross production tax should not be imposed prior to July 1, 1931. The legislative history recognized that even when the land itself was tax-exempt because of the restrictions, the lessees were liable for an *ad valorem* tax on their property. H. Rep. No. 2327, 71st

[36] the history of Congressional action and inaction was not considered to be an assertion of immunity for lessees against a state or federal net income tax. *Helvering* v. *Mountain Producers Corp.*, *supra*. It would be surprising, accordingly, if Congress should have had no objection to the imposition of an *ad valorem* tax but should have objected to the collection of the identical amounts from the lessee when accomplished by a gross production tax which is used in the place of the more cumbersome *ad valorem* levy. It would also be strange if Congress believed it proper that the lessee should pay a net income tax but not a tax measured by gross income or gross production.

Actually, when *Mountain Producers* had settled the conclusion that such lessees stand in no more favored position to invoke a constitutional immunity against a net income tax than any other private Government contractor, Congress was certainly entitled to believe that these lessees would be required to pay the same kind of non-discriminatory local taxes as other contractors are required to bear. The failure of Congress, either before or after the *Mountain Producers* decision, to assert a tax exempt status for the lessees of restricted Indian lands, undoubtedly indicates an intent to permit them to be taxed by the local authorities to the limit of constitutional power.

Once the constitutional doctrine was resolved against the existence of the immunity, there was no
[37] plausible reason for creating an implied legislative one. Except as it may be reflected in an increased income to the Indians, Congress would have no discernible purpose in exempting the lessees from the taxes which are under consideration. However, whether such an exemption would result in an increased return to the In-

Cong., 3d Sess., and S. Rep. No. 1399, 71st Cong., 3d Sess., containing a letter from the Commissioner on Indian Affairs dated January 15, 1931.

dian wards is only theoretic. The observations in the *Mountain Producers* case, *supra*, pp. 386-387, that a tax on the lessee's net income has only a remote or indirect effect on the Government is supported by the fact that the leases approved by the Department of Interior provided for the same rental and royalty payments both before and after the overruling of *Gillespie* v. *Oklahoma*, *supra*.[17] Further, the royalty and rental payments provided for by the Department of Interior in the case of leases of lands allotted under
[38] the General Allotment Act are exactly the same as those in the case of lands of members of the Five Civilized Tribes, where the lessees have been subject to the gross production tax since 1928.[18] It seems a safe conclusion that the lessee's tax status has little, if any, effect on the Indian royalty owners. At least, if the taxation of the lessee is deemed to have an adverse effect on the governmental policy toward the Indian lessors, it is a matter which should call for a positive indication by Congress.[19]

[17] Under Regulations Governing the Leasing of Restricted Allotted Indian Lands for Mining Purposes, approved October 8, 1937 (25 C.F.R., Sections 189.1-189.33) (issued prior to the *Mountain Producers* decision but still in effect), leases are offered to the bidder offering the highest bonus, in addition to the stipulated rentals and royalties which are a rental of $1.25 per acre per year and royalties of 12½ percent, the rental to be credited on the royalties due. The same royalties (without a minimum rental) were provided for in the predecessor regulations approved July 7, 1925.

Because differences in the value of different tracts of land would be reflected in the bonus which the lessor is willing to pay, an exact comparison is impossible. The fact that the royalties have remained the same does, however, tend to show that the lessors have not been significantly affected by the *Mountain Producers* decision.

[18] See Regulations Governing the Leasing of Restricted Lands of Members of Five Civilized Tribes, Oklahoma, for Mining, approved April 27, 1938 (25 C.F.R., Sections 183.1-183.49).

[19] Since the lessees, as previously indicated, are liable for *ad valorem* taxes, it is difficult to see why the gross production tax,

The rejection of the "economic burden" argument as a ground for implying a constitutional tax immunity is equally persuasive for rejecting the contention that Congress has created one by inference. *Oklahoma Tax Comm'n* v. *United States, supra,* 319 U.S. at 604. The statement in *Graves* v. *N.Y. ex rel. O'Keefe, supra,* 306 U.S. at 480, is similarly apt here—

> if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any
> [39] purpose on the part of Congress to create an immunity.

In the absence of a clear expression of a legislative purpose to immunize a private lessee or contractor from non-discriminatory local taxation, doubtful indications of Congressional intent ought to be interpreted against the existence of such immunity. *Smith* v. *Davis, supra,* 323 U.S. at 117; *Oklahoma Tax Comm'n* v. *United States, supra*; *Buckstaff Co.* v. *McKinley,* 308 U.S. 358; *Graves* v. *N.Y. ex rel. O'Keefe, supra,* 306 U.S. at 479-480. Here, where Congress has never expressed a purpose to place the private lessee in a tax immune status, the conclusion is clear. A cautious approach in interpreting the silence of Congress will not only avoid the casting of an unnecessary burden on it to disavow an immunity which it does not desire, but will also prevent an unwarranted temporary interference with the taxing authority of the State.[20]

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when levied in lieu of such taxes, would have such an effect on the royalty owners as to impel Congress to invoke an immunity for the lessees against this tax, but not against the *ad valorem* tax.

[20] Where the immunity of the United States itself or of its property is asserted, the silence of Congress must be given an opposite meaning for it is not incumbent on Congress to make an express declaration of the immunity. See *United States* v. *Allegheny County,* 322 U.S. 174, 177, 189; *Mayo* v. *United States,* 319 U.S. 441,

[40] These matters plainly indicate the conclusion that no tax immunity exists for the taxpayers in these cases.

447-448. Whether Congressional silence, where the taxable status of the property of Indians is in question, should be weighed for or against the existence of the immunity (compare *Oklahoma Tax Comm'n* v. *United States, supra,* and *Superintendent* v. *Commissioner, supra,* with *Carpenter* v. *Shaw, supra,* and *United States* v. *Rickert, supra*) need not be resolved here, for the tax immunity of a private lessee or contractor stands on an altogether different basis and no sound reason can be suggested for a "liberal" interpretation in favor of its existence.

* * * *

AMICUS CURIAE

BRIEF

No. 87-1327

(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COTTON PETROLEUM CORPORATION, *et al.*,
Appellants,

v.

STATE OF NEW MEXICO, *et al.*,
Appellees.

On Appeal from the Court of Appeals of the State of New Mexico

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BRIEF *AMICI CURIAE* OF THE CROW TRIBE, THE SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, THE ARAPAHO TRIBE OF THE WIND RIVER RESERVATION, THE YAVAPAI-APACHE TRIBE, THE AMERICAN INDIAN RESOURCES INSTITUTE, THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE APACHE TRIBE OF THE MESCALERO RESERVATION HOUSING AUTHORITY, AND THE PUEBLO OF LAGUNA HOUSING AUTHORITY

CATHERINE BAKER STETSON*
SUSAN M. WILLIAMS
GOVER, STETSON & WILLIAMS, P.C.
1225 Rio Grande Boulevard, N.W.
Albuquerque, New Mexico 87104-2630
(505) 842-6961

Counsel for the Crow Tribe, the Shoshone Tribe of the Wind River Reservation, the Arapaho Tribe of the Wind River Reservation, the Yavapai-Apache Tribe, the American Indian Resources Institute, the National Congress of American Indians, the Apache Tribe of the Mescalero Reservation Housing Authority, and the Pueblo of Laguna Housing Authority

Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1327

COTTON PETROLEUM CORPORATION, *et al.*

Appellants,

v.

STATE OF NEW MEXICO, *et al.*

Appellees.

On Appeal from the Court of Appeals of the State of New Mexico

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BRIEF *AMICI CURIAE* OF THE CROW TRIBE, THE SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, THE ARAPAHO TRIBE OF THE WIND RIVER RESERVATION, THE YAVAPAI-APACHE TRIBE, THE AMERICAN INDIAN RESOURCES INSTITUTE, THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE APACHE TRIBE OF THE MESCALERO RESERVATION HOUSING AUTHORITY, AND THE PUEBLO OF LAGUNA HOUSING AUTHORITY

Pursuant to Rule 36.3, the above-named Indian tribal governments and Indian-interest organizations file this brief *amici curiae* in support of the respondents in the above-captioned case.

INTEREST OF *AMICI CURIAE*

The Crow Tribe, the Shoshone Tribe of the Wind River Reservation, the Arapaho Tribe of the Wind River Reservation, and the Yavapai-Apache Tribe (the "tribal *amici*") all are federally recognized Indian tribes which exercise powers of self-government. All tribal *amici* and the other *amici* Indian organizations including housing authorities consider tribes' ability to generate taxation revenues to be a key element in tribal efforts to strengthen their governments and promote the development of Indian reservation economies. All *amici* also consider tribes' ability to generate maximum proprietary revenues from the natural resources on their reservations to be critical to tribal efforts to control their destinies and decrease their dependence on the federal government. The tribal *amici* are profoundly concerned that this case, which has the potential to have a great impact upon their rights both as governments and as resource owners, has been litigated without any Indian tribe as a party and without the contribution that tribal participation could have made to the record.

The National Congress of American Indians ("NCAI") was founded in 1944 and is the oldest and largest national organization of Indian governments and individuals in the United States, with a membership of federally recognized tribes representing a combined population of over 750,000 American Indian and Alaska Native people. NCAI and its members have a concern for the ability of Indian tribes to protect their sovereign interests from burdensome state regulation and taxation. NCAI and its members also are concerned with the ability of Indian tribes as resource owners to maximize their revenues from

such resources by controlling the development of those resources. All of these rights are critical to the survival of Indian tribes as distinct cultural entities, and to the economic development needed desperately to break the cycle of poverty which has plagued Indian people for generations.

The American Indian Resources Institute ("Institute") is a tax-exempt, nonprofit corporation affiliated with the American Indian Lawyer Training Program. The Institute has as its central purpose the sound development of Indian reservation resources. Critical to such management is the ability of the tribes to maximize their proprietary income from their resources, while asserting comprehensive governmental control over the development of such resources. State regulation and taxation pose serious threats to the tribes' ability to achieve this delicate balance.

The Shoshone and Arapaho Tribes of the Wind River Reservation in Wyoming have more than 6,000 enrolled tribal members, most of whom reside on the Reservation. The Shoshone and Arapaho Tribes have enacted a severance tax on oil and gas production to raise revenues for the essential governmental services needed by residents of the Wind River Reservation; however, the Shoshone and Arapaho Tribes have been unable to raise sufficient severance tax revenues to provide these services because the State of Wyoming and Fremont County, Wyoming levy substantial taxes on Reservation oil and gas production, and the higher tax burden results in decreased production.

The Crow Tribe is concerned that its long legal battle with the State of Montana, which resulted in the recent affirmance by this Court of the Ninth Cir-

cuit decision in *Crow Tribe v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd mem.*, ___ U.S. ___, 108 S.Ct. 790 (1988), be protected. The Crow Tribe is concerned that this Court not issue a decision which authorizes states to tax in excess of the value of services delivered to the reservation taxpayers. Such a decision would impair the ability of the Crow Tribe to generate vitally needed income to sustain its government and promote the development of a vigorous economy on the Crow Reservation.

The Yavapai-Apache Tribe of Arizona is a small tribe with scant taxable resources. It may not have statutory grounds to pre-empt state taxes imposed upon activities upon its Reservation and is greatly concerned, therefore, that this Court affirm other theories that would permit the Tribe to shield itself from burdensome state taxation in excess of the value of state services delivered to taxpayers on its Reservation. The Tribe has not enacted a tax at this time but intends to do so in the immediate future. The tribal tax combined with the state tax, however, likely will impose competitive disadvantages upon reservation taxpayers as compared to non-reservation taxpayers and, thus, will inhibit investment on the Reservation. The Tribe is anxious for this Court to prevent such an unfortunate result.

The Apache Tribe of the Mescalero Reservation Housing Authority and the Pueblo of Laguna Housing Authority ("Housing Authorities") are tribally owned and chartered corporations whose purpose is to promote the development of and to maintain federally funded housing on their respective reservations. The Housing Authorities oversee the construction of such

housing and are concerned that this Court adopt rules which will limit state taxes that may be imposed upon such construction activities. State taxation in excess of services delivered to taxpayers on the Reservation will burden the construction of desperately needed housing on the Reservation.

This brief is filed with the written consent of all parties to the litigation.

SUMMARY OF ARGUMENT

In this case, the Court lacks jurisdiction to hear the claim of Cotton Petroleum Corporation (Cotton) under the Interstate Commerce Clause because a substantial federal question does not exist. Since 1832, this Court has held that the Framers intended commerce with Indian tribes to be regulated pursuant to the Indian Commerce Clause of the United States Constitution. The Interstate Commerce Clause never has been employed as a shield against burdensome state taxation of commerce with Indian tribes, and Indian tribes never have been held subject to constitutional provisions framed as limitations specifically on states. Plainly, the Interstate Commerce Clause does not apply in this case.

An Indian Commerce Clause issue is not properly before the Court. If the Court decides to address the issue, however, New Mexico's taxes should be held invalid. States should be required to tailor carefully their taxes and regulations as applied to on-reservation activities, in order to protect only compelling state interests. In this case, that rule would require that the state taxes be limited to the value of the services delivered to the reservation taxpayers. Such a requirement would apply particularly in circumstances where, for any of several reasons, a federal

pre-emption claim may not exist. This rule is necessary in light of overriding federal laws and policies supporting the strengthening of tribal self-government, economic development on Indian reservations, and the maximization of tribal royalties and other proprietary revenues from reservation oil and gas production. This rule also is particularly necessary because the state receives both federal funding and off-reservation tax revenues which amply reimburse it for the cost of its scant services on the reservation.

The Court lacks jurisdiction to hear Cotton's federal pre-emption claim because Cotton waived such claim by failing to present it to the New Mexico Supreme Court. If, however, this Court determines that the federal pre-emption claim has been presented properly, New Mexico's taxes should be ruled invalid, as oil and gas production on the Jicarilla Apache Reservation is regulated pervasively by the federal government, and insufficient state interests exist to justify the state taxes. The only legally cognizable state interest justifying imposition of state taxes is the cost of providing state services to the taxpayer. Recognition of such a correlation is appropriate in light of the important federal policies applicable here, and the existence of federal funding and off-reservation tax collections available to pay for the costs of services and state governmental obligations incurred with respect to the reservation. The state's taxes also conflict violently with numerous federal laws and policies that promote the maximization of the Tribe's oil and gas royalties and support the strengthening of tribal government and development of Indian reservation economies.

ARGUMENT

I. THE MOTION TO DISMISS SHOULD BE GRANTED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION.

Cotton cites 28 U.S.C. § 1257(2) as a basis for this Court's jurisdiction. For jurisdiction to lie under that statute, however, a substantial question must exist under federal law. *Grisanti v. City of Cleveland*, 371 U.S. 622 (1962). This Court consistently has held that tribes are unique sovereigns to be viewed as completely distinct and apart from states. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1831); *Arizona v. California*, 373 U.S. 546 (1962); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

In support of its thesis that a substantial federal question exists, Cotton relies on a dictum in footnote twenty-six in *Merrion v. Jicarilla Apache Tribe*, *supra*, inferring from the scant language that tribes are states for purposes of Interstate Commerce Clause analysis. That dictum, however, does not pose a debatable federal question; rather, it merely notes that, where commerce both crosses a state line and occurs on an Indian reservation, the commerce may be within the scope of *Commonwealth Edison Co. v. Montana*, 453 U.S. 607 (1981). The footnote also may be read to apply where an Indian Commerce Clause challenge to a state tax is made on other than pre-emption grounds.

The treatises and cases clearly show the Framers' intent that commerce with tribes be regulated sepa-

rately and more strictly than interstate commerce, and, thus, the Framers added a clause distinct from the clause applicable to commerce among states. In none of this Court's decisions have tribes ever been defined as states for constitutional purposes. Indeed, the contrary is true.

As this Court emphasized in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56:

> As separate sovereigns preexisting the Constitution, tribes have historically been regarded as unconstrained by these constitutional provisions framed specifically as limitations on federal or state authority.

Cotton's contention, in light of this Court's unbroken line of decisions to the contrary, is insubstantial. *See Zucht v. King*, 260 U.S. 174 (1922).

II. THE MOTION TO DISMISS SHOULD BE GRANTED FOR LACK OF JURISDICTION BECAUSE COTTON FAILED TO PRESENT THE FEDERAL PRE-EMPTION CLAIM TO THE HIGHEST COURT OF NEW MEXICO IN WHICH A DECISION COULD BE HAD.

A federal pre-emption claim is presented here only if Cotton shows that the highest court of New Mexico in which a decision could be had has rendered a final judgment on the pre-emption claim. 28 U.S.C. § 1257(2). Cotton cannot make such a showing, and, as a result, this Court lacks jurisdiction to consider Cotton's claim.

Because the New Mexico Supreme Court denied a writ of certiorari to the New Mexico Court of Appeals, the judgment under appeal technically is that of the Court of Appeals. *Minneapolis, St. P. & S. Ste. M.*

R. Co. v. Rock, 279 U.S. 410 (1928), *reh. denied*, 50 S.Ct. 79 (1929). The pre-emption claim considered by the Court of Appeals, however, was waived by Cotton's failure to present the claim in its petition for a writ of certiorari to the New Mexico Supreme Court. Such claim, according to New Mexico law, has been abandoned.

Parties litigating federal questions in state courts are required to comply with reasonable state law rules of procedure, including rules governing waiver of questions not presented. *See* Stern, Gressman, and Shapiro, *Supreme Court Practice* (6th ed. 1986) at 168-70. Where state law grounds exist independently of any federal issue, and such grounds are adequate to support the judgment of the state court, United States Supreme Court jurisdiction to review the federal claim is precluded, even where the state court patently was in error in its interpretation of federal law. *Id.*; *see also Michigan v. Long*, 463 U.S. 1032 (1983).

Where the application of a state procedural rule has the effect of denying both state court consideration of a federal claim and, therefore, United States Supreme Court review, the state rule governs, provided that it is neutral on its face and as applied. *See Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); *Dice v. Akron Canton and Youngstown R.R.*, 342 U.S. 359 (1952); Stern, Gressman, and Shapiro, *supra*, at 181. This Court lacks authority to correct state supreme courts on questions of state law. *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875).

Under New Mexico Rules of Appellate Procedure, Rule 12-502(C)(2), a petition for a writ of certiorari to the Supreme Court of New Mexico must specifically

set forth "the questions presented for review." Moreover, under Rule 12-502(C)(2) and New Mexico case law, "only questions set forth in the petition will be considered by the [New Mexico Supreme Court]." *McDonald v. Denison*, 51 N.M. 386, 389, 185 P.2d 508 (1946); *Hernandez v. Border Truck Line*, 49 N.M. 396, 399, 165 P.2d 120 (1946); *Biggs v. Whelan*, 56 N.M. 38, 43, 239 P.2d 727 (1952); *Sproul Construction Co. v. St. Paul Fire and Marine Insurance Co.*, 74 N.M. 189, 191, 392 P.2d 339 (1964); *Sangre de Cristo Development Corp., Inc. v. City of Santa Fe*, 84 N.M. 343, 345-46, 503 P.2d 323 (1972); *St. Vincent Hospital v. Salazar*, 95 N.M. 147, 149, 619 P.2d 823 (1980).[1]

In its petition for a writ of certiorari to the New Mexico Supreme Court, the only question presented by Cotton was whether the New Mexico taxes violate the Interstate Commerce Clause. Cotton failed to petition for review of its pre-emption claim. Indeed, the pre-emption claim appears to have been abandoned by Cotton at oral argument in the New Mexico Court of Appeals. As the New Mexico Court of Appeals states in its opinion, "Cotton does not challenge the District Court's conclusion on preemption . . . ." *See* Jurisdictional Statement of Cotton Petroleum at App. 10. In similar circumstances, this Court has held that it lacks jurisdiction. *Pennsylvania R. R. v. Illinois Brick Co.*, 297 U.S. 447 (1936), *reh. denied*, 297 U.S. 728 (1936) (no federal jurisdiction to consider a question which the highest state court had declined to rule upon for lack of proper presentation.)

[1] Prior to October 11, 1984, Rule 28, which is analyzed in the above-cited cases, governed appeals to the New Mexico Supreme Court. The old Rule 28(c)(2), however, is identical in content to the current Rule 12-502(C)(2).

Had the New Mexico Supreme Court agreed to hear Cotton's appeal, the New Mexico Supreme Court, under Rule 12-502(C)(2) and interpretive New Mexico law, would have had jurisdiction to hear only the commerce clause challenge; accordingly, this Court has jurisdiction to hear only the commerce clause challenge. Cotton should not be allowed to ignore established mandates by proceeding in this Court with claims not presented to the New Mexico Supreme Court. Allowing Cotton to present its pre-emption claim would open the door to a practice of seeking certiorari on an irrelevant or minor issue, obtaining a predictable denial of certiorari, and proceeding directly to the United States Supreme Court, thereby deliberately bypassing the highest court in the given state. *Cf. Fay v. Noia*, 372 U.S. 391 (1963).

III. IF THE COURT DECIDES TO CONSIDER THE INTERSTATE COMMERCE CLAUSE CLAIM, THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE TRIBES ARE NOT STATES WITHIN THE MEANING OF THE INTERSTATE COMMERCE CLAUSE, AND NEW MEXICO'S TAXES, THEREFORE, DO NOT CONFLICT WITH THAT CLAUSE.

The Court has requested argument concerning whether the transport of oil and gas from the Jicarilla Apache Reservation into the State of New Mexico should be considered interstate commerce and whether the Jicarilla Apache Tribe is a "state" within the meaning of the Interstate Commerce Clause. Because the record below does not show that the commerce at issue here—namely, the production of oil and gas within the Reservation and its transportation across Reservation boundaries—crosses the exterior boundaries of the State of New Mexico, *interstate* com-

merce, by definition, is not involved. Moreover, no law or policy supports the view that tribes should be treated as states within the meaning of the Interstate Commerce Clause. To the contrary, law and policy require that state taxes, as applied to activities on Indian reservations, must be analyzed under the Indian Commerce Clause, which has not been relied upon by the parties here. Because Cotton argued to the appellate courts below that the Interstate Commerce Clause should be employed to apportion taxes between New Mexico and the Jicarilla Apache Tribe, a claim based on the Indian Commerce Clause is not properly presented here. *See* Stern, Gressman, and Shapiro, *supra*, at 144-51.

A. The History and Plain Meaning of the Commerce Clause Make Clear that the Framers Did Not Intend for Commerce with Indians To Be Regulated Under the Interstate Commerce Clause.

The Commerce Clause of the United States Constitution empowers Congress "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian tribes." United States Constitution, art. I, § 8, cl. 3. Where Congress has not acted, this clause makes federal courts the final arbiters of competing demands of state and national interests by limiting state legislation that discriminates against or places impermissible burdens upon commerce "among the several States." *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 454 (1979), *quoting Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 350 (1977).

The structure and history of the Commerce Clause compel the conclusion that the Framers intended that state legislation which impermissibly burdens commerce with Indian tribes be scrutinized under the Indian Commerce Clause, rather than the Interstate Commerce Clause. As this Court opined in *Cherokee Nation v. Georgia*, 30 U.S. at 18, with respect to the Commerce Clause:

> In this clause [Indian tribes] are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as *from the several states composing the union*. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. *When forming this article, the convention considered them as entirely distinct.* (Emphasis added.)

The Framers provided for separate treatment of commerce with Indian tribes, as distinguished from commerce among the states, because the Framers intended that commerce with Indian tribes be regulated differently from commerce among the states. In *Worcester v. Georgia, supra*, this Court reasoned that the Framers' treatment of commerce *with* Indian tribes, like the treatment of commerce *with* foreign nations and unlike the treatment of commerce *among* the several states, mandated the conclusion that the Framers' intent was that commerce with Indian

tribes, like commerce with foreign nations and unlike commerce among the states, was to be regulated exclusively by Congress. *Accord, Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964); *Chippewa Indians v. United States*, 301 U.S. 358, 275-76 (1937). Clearly, the Framers intended commerce with Indian nations to be protected differently from commerce among the several states, recognizing that Indian nations predated the states and that Indian citizens enjoyed a vastly different legal status from that of citizens of states. This deference to congressional and presidential power arose in large part from the fact that relations with Indian and foreign governments, unlike those with the states, were governed by treaties. The role of the courts in regulating commerce with Indian tribes and foreign nations correspondingly was to prevent state regulation of such commerce, unless Congress had consented to the regulation. *Worcester v. Georgia*, 31 U.S. at 559. In short, Indian commerce was to be subject to a regulatory regime distinct from that applied to interstate commerce.

The Court's holdings in *Cherokee Nation* and *Worcester* reflect accurately the history of the Commerce Clause in particular and the Constitution more generally. Article IX of the Articles of Confederation granted Congress "the sole and exclusive right and power . . . of regulating the trade and managing all affairs with the Indians," but exempted Indians who were "members of any of the States" and presumed "the legislative right of any State within its own limits." As Madison wrote in *The Federalist*, No. 42, this ambiguous and shared authority of the national and state governments over the Indian reservations

was an "endeavor to accomplish impossibilities." Accordingly, the Framers adopted the Indian Commerce Clause to eliminate these impossibilities by vesting Congress with the exclusive legislative authority over commerce with Indians. 2 M. Farrand, *The Records of the Federal Convention of 1787*, 321, 324 (1966); Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn.L.Rev. 432, 467-68 (1941).

The Framers also implied that Indian reservations were not considered part of the states in which they were located by excluding Indians from the population base used to apportion representatives; indeed, until 1924, Indians were not even citizens. United States Constitution, art. I, § 2, cl. 3; *see also* United States Constitution, amend. XIV, § 2.

B. Tribes Are Not Considered To Be States for Purposes of Constitutional Provisions Referring Expressly to States.

As sovereigns predating the United States, Indian tribes without exception have been held to be unhindered by constitutional provisions framed specifically as limitations on states. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 n.3 (1978); *United States v. Wheeler*, 435 U.S. 313, 328-29 (1978); *see also Talton v. Mayes*, 163 U.S. 376 (1896). Even though this Court has departed from strict adherence to its *Worcester* decision and now favors a modified pre-emption analysis to determine whether state jurisdiction lies, this Court never has abandoned its position that tribes are not to be treated as states for purposes of construing the Constitution. As the Court emphasized in *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56:

> As separate sovereigns preexisting the Constitution, tribes have historically been regarded as unconstrained by these constitutional provisions framed specifically as limitations on federal or state authority.

This Court, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143, has opined:

> Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.

Similarly, the Court, in *Arizona v. California*, 373 U.S. at 597, emphasized simply that:

> The doctrine of equitable apportionment is a method of resolving water disputes between States .... An Indian Reservation is not a State.

Of special relevance to the case at hand is this Court's admonition in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 153-54, that:

> To date, however, this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference ....

Significantly, in *Merrion* this Court noted that the Commerce Clause may require judicial relief from state taxes on activities on Indian reservations. *Id.* at n.26. Such relief would, of course, be grounded in the Indian Commerce Clause where, as here, the com-

merce at issue flows between an Indian reservation and a state.

Theoretically, a similar restraint on state powers of taxation might exist under the Interstate Commerce Clause where state taxes are imposed upon commerce between two states without consideration of an identical tribal tax imposed upon the same commerce. In such a case, state taxes might be held not to bear any relationship to the taxpayer's activities in the state, particularly if the federal and tribal governments, and not the state government, bear the primary burden of providing governmental services on the reservation. *Cf. Commonwealth Edison Co. v. Montana*, 453 U.S. at 624-25. In this case, however, the record does not show that commerce crosses the state's boundary. Thus, only the Indian Commerce Clause exists as a shield against burdensome state taxation, and the Interstate Commerce Clause does not apply.

IV. IF THE COURT REACHES THE MERITS OF AN INDIAN COMMERCE CLAUSE CLAIM, THE DECISION BELOW SHOULD BE REVERSED.

The Indian Commerce Clause is a basis for limiting intrusive state regulations or taxation on a reservation even if insufficient grounds for federal pre-emption exist. In such a case, an Indian Commerce Clause claim is available to prevent or limit undue state law burdens on commerce with Indian tribes.

The Commerce Clause, on its face, treats Indian commerce as distinct from interstate commerce. The purposes of each of these clauses are quite distinct. The Interstate Commerce Clause was adopted to ensure that State boundaries do not impede the flow of

commerce. *Commonwealth Edison Co. v. Montana*, 453 U.S. at 619; *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. at 350. However, "interstate commerce must bear its fair share of the State tax burden." *Washington Revenue Dept. v. Association of Washington Stevedoring Co.*, 435 U.S. 734, 750 (1978). Accordingly, this Court has mandated that, for a state tax on interstate commerce to pass constitutional muster, the tax must be applied to an activity with a substantial nexus with the taxing state, be fairly apportioned, not be discriminatory, and be fairly related to the services provided by the state. *Complete Auto Transit v. Brady*, 430 U.S. 274, 279 (1977). As long as the state's tax is measured as a percentage of the value of, *e.g.*, coal severed in the state, however, no constitutional limit exists on the size of the percentage, presumably because the taxpayer is shouldering a fair share of the costs of a civilized society. *Commonwealth Edison Co. v. Montana*, 453 U.S. at 625.

In contrast, when a state imposes a tax on commerce with an Indian tribe on a reservation, at least two additional considerations come into play. First, because the state and tribe usually tax the same activity, the spectre of multiple taxation always exists. Second, state taxes on Indian commerce prevent uniform treatment of tribes, contrary to federal policy. The requirement of apportionment employed to prohibit taxation on the same activity by two or more states is inapplicable where a state and a tribe tax the same activity, particularly where both appear to have a sufficient nexus with the taxpayer. In such a case, Indian commerce inevitably bears greater tax burdens than does interstate commerce that does not traverse a reservation.

If the Interstate Commerce Clause were to apply, an extremely high state tax on top of tribal taxes may still pass muster under the standards established in *Complete Auto*. Moreover, the state could justify its tax by arguing that it is providing the advantages of civilized society, an advantage that is difficult to value. The Framers adopted the Indian Commerce Clause to address just such a problem.

In addition, a state tax on Indian commerce may impair the federal interest in uniformity in the treatment of Indian tribes. The United States promised in treaties, in return for vast land cessions, to provide education and trust protection of tribal resources. Since the earliest days of the Republic, the federal government has enacted general legislation to protect Indian interests and to promote the development of Indian communities. *See, e.g.*, The Indian Trade and Intercourse Acts, Act of March 1, 1793, ch. 19, §§ 6 and 7, 1 Stat. 330; Act of June 30, 1834, ch. 101, §§ 3, 7, and 20, 4 Stat. 729, 730, 732; 25 U.S.C. § 177. *See also Morton v. Mancari*, 417 U.S. 535, 552 (1974) (tribal citizens enjoy unique federal employment preferences); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904) (tribes, unlike states, may exclude nonmembers from their territories).

Current federal Indian policy uniquely promotes the strengthening of tribal government and the development of reservation economies. *California v. Cabazon Band of Mission Indians*, ___ U.S. ___, ___, 107 S.Ct. 1083, 1092 (1987). Of special relevance is the Indian Mineral Leasing Act of 1938, one purpose of which was to achieve "uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong.,

1st Sess. at 2 (1937); H. Rep. No. 1872, 75th Cong., 3d Sess. at 1 (1938). Congress' intent to provide certain benefits to Indian tribes in a uniform fashion and to pursue national Indian policies would be undermined by state taxes that vary and, thus, effectively disrupt the provision of uniform federal benefits. To accomplish the unique and difficult objective of achieving uniformity in federal Indian affairs, the Framers intended that the scope of the Indian commerce power be greater than that of the interstate commerce power, in a fashion similar to that of the foreign commerce power. *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. at 448.

Under the Indian Commerce Clause, this Court should require evaluation of a state tax to determine whether it interferes with uniform federal Indian policies. Such uniformity is not protected where state tax collections exceed the value of services delivered to the taxpayer. In other words, where the state tax exceeds the value of state services to taxpayers on a reservation, the state is draining for off-reservation benefit the limited economic rent available to satisfy the important federal policies supporting tribal governments, the development of reservation economies, and maximization of tribal income from tribal resources. *See, e.g.*, Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1534 (1982); Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-396g (1982) and as described in *Montana v. Blackfeet Indian Tribe*, 451 U.S. 759 (1985); Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1982). In addition, such a state tax would constitute an unreasonable burden on doing business with Indian tribes, because it imposes a competitive disadvantage upon on-reservation taxpayers who uniquely must pay tribal and state taxes.

Only a limited amount of economic rent is available from oil and gas production to satisfy the federal objectives of maximizing the proprietary income of the tribe and ensuring that sufficient tribal income is available to provide essential governmental services and promote the development of reservation economies. Every dollar paid in state tax means a dollar less is available for these important federal purposes, and New Mexico so admits in this case. *See* Tr. 246, 402. In addition, some economic rent must be left for the taxpayers, so that incentives exist for investment on Indian reservations. New Mexico, nevertheless, has levied several taxes on the reservation taxpayers, with the revenues going mainly to off-reservation benefits without any consideration of these important objectives.

On-reservation benefits are provided in most instances by federal and tribal governments, and not by state governments. The states, moreover, lack jurisdiction over reservation activities in many areas and consequently may lack the ability to enact or enforce their laws on the reservations. *California v. Cabazon Band of Mission Indians, supra; White Mountain Apache Tribe v. Bracker, supra; New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). Also, many "state" services to reservation Indians in fact are federally funded. *See, e.g.*, Federally Impacted Areas Act, 20 U.S.C. §§ 236-44 (1980); School Facilities Construction Act, 20 U.S.C. §§ 631-47 (1958). Finally, for state services delivered to the reservations, the state has ample off-reservation tax revenues collected from on-reservation taxpayers who

leave the reservation to purchase goods and services. A state has no constitutional right to require a *quid pro quo* between services delivered and taxes paid. *Cf. Thomas v. Gay*, 169 U.S. 264, 278 (1897); *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937).

Against this backdrop, the Court, under the oft-ignored Indian Commerce Clause, must require a state to limit its taxes in order to avoid an undue tax burden on reservation taxpayers, to minimize the competitive disadvantages experienced uniquely by such taxpayers, and to preserve the vitality of commerce with Indians in accordance with weighty federal laws and policies.

As noted, *amici* do not believe that an Indian Commerce Clause issue has been properly presented in this case. If the Court holds otherwise and reaches the merits of that issue, *amici* submit that the Court should hold New Mexico's taxes to be in violation of the Indian Commerce Clause.

V. IF THE COURT HAS JURISDICTION TO CONSIDER THE PRE-EMPTION CLAIM, NEW MEXICO'S TAXES SHOULD BE RULED INVALID AS PRE-EMPTED UNDER FEDERAL LAW.

A. Because Oil and Gas Production on the Jicarilla Apache Reservation Is Regulated Pervasively by the Federal Government, New Mexico's Taxes Are Pre-Empted.

Oil and gas production on the Jicarilla Apache Reservation is regulated pervasively by the federal government: the Bureau of Indian Affairs supervises and approves leasing decisions, the Bureau of Land Management supervises production accounting, and the Minerals Management Service supervises royalty accounting. *See* Brief of Cotton at pp. 18-20. In short, no oil and gas transaction on the reservation may be made, assigned, or modified without federal review and approval. This case, therefore, is in no relevant way distinguishable from this Court's long line of cases holding that, where an activity on an Indian reservation is regulated pervasively by the United States, no room is left for state taxation or regulation, absent a showing of compelling state interests. *See Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965); *White Mountain Apache Tribe v. Bracker, supra; Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *New Mexico v. Mescalero Apache Tribe, supra.*

B. The Purposes of the Indian Mineral Leasing Act of 1938 and Other Federal Laws Pre-Empt New Mexico's Taxes.

The Indian Mineral Leasing Act of 1938, the Indian Financing Act of 1974, the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1982), and the Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871 (1982 and Supp. VII 1988),

all pre-empt state taxes on the reservation. In determining whether federal laws pre-empt state taxation, Congress need not explicitly announce its intent to pre-empt the state activity. *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. at 838.

The Indian Reorganization Act of 1934 was enacted to encourage economic development and to strengthen tribal government on Indian reservations. *See* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.). In particular, the Indian Mineral Leasing Act of 1938 was enacted (1) to achieve "uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes," S. Rep. No. 985, *supra*, at 2; H. Rep. No. 1872, *supra*, at 1; (2) to "bring all mineral leasing matters in harmony with the Indian Reorganization Act," S. Rep. No. 985, *supra*, at 3; H. Rep. No. 1872, *supra*, at 3; and (3) to ensure that Indians receive "the greatest return for their property," S. Rep. No. 985, *supra*, at 2; H. Rep. No. 1872, *supra*, at 2. The Indian Financing Act of 1974 was enacted to further the development of Indian reservation economies. *See California v. Cabazon Band of Mission Indians*, 107 S.Ct. at 1093.

The Indian Mineral Development Act of 1982 was enacted to permit a greater return for tribal mineral resources than is possible through leasing, by authorizing flexible and creative production arrangements. H. Rep. No. 746, 97th Cong., 1st Sess. at 4 (1982). The Indian Tribal Governmental Tax Status Act of 1982 was enacted to treat tribes in a fashion identical to that of states for purposes of federal tax benefits, since tribes, like states, are responsible for the provision of essential governmental services on

the reservations. S. Rep. No. 646, 97th Cong., 1st Sess. at 11 (1982).

The canons of statutory construction in Indian law are rooted in the unique trust relationship between the United States and the Indians. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Accordingly, statutes passed for the benefit of Indians must be construed liberally in their favor, with ambiguous provisions interpreted to their benefit. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973). When the Indian Reorganization Act of 1934, the Indian Mineral Leasing Act of 1938, the Indian Financing Act of 1974, the Indian Mineral Development Act of 1982, and the Indian Tribal Governmental Tax Status Act of 1982 are considered in light of these canons, it is absolutely clear that Congress has never authorized state taxation of the reservation oil and gas production and, instead, may be held to have ousted such state taxation.

In all of this legislation, two longstanding and critical federal policies directly applicable to the case at hand are relevant. First, federal policy supports the maximization of tribal revenues from tribal mineral wealth. Second, federal policy supports the strengthening of tribal governments, which strengthening necessarily requires that tribes have uninhibited access to the tax revenues from wealth on the reservations. Against these principles, New Mexico's taxes, which have the ability to disarrange and disrupt the delicate balance between sustained production and tribal revenue maximization, and which have the further ability to displace tribal taxes on the same production as a result of the limited amount of economic rent available from the mineral production, conflict directly with

these important federal policies.[2] Such a conclusion is not disturbed by *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1948), and related cases holding that leases are not immune from state taxation, for these cases did not address whether other laws preempt such taxation.

Only a determinate amount of costs may be imposed upon the lessees in this case before they will find it economically unsound to produce oil and gas from the Jicarilla Reservation. A finite economic rent is available from which to pay all royalties and taxes, as New Mexico admits. *See* Tr. 246, 402. The tribes have a proprietary right to the maximum royalties from oil and gas, and a tribal government has the right to taxes sufficient to meet the burgeoning social service and economic development needs on the reservation. And, of course, some economic rent must be left for the producers, so that the reservation can continue to attract investments.

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 136, the Court ruled invalid a state tax of less than one percent of total annual profits on the ground that the tax would threaten the overriding federal objectives of guaranteeing Indians that they will "receive . . . the benefit of whatever profit [the forest] is capable of yielding . . . ." New Mexico's much larger taxes conflict fatally with the federal objectives of maximizing tribal royalty and taxation

[2] Indeed, a state tax on a non-Indian lessee's mineral production on Indian lands arguably is a tax on Indian enterprise since, prior to 1982, the only way Indians could produce oil and gas from their lands was by lease. The 1982 Indian Mineral Development Act was enacted to permit Indians to participate directly in such production. *Cf. Thomas v. Gay*, 169 U.S. 264, 275 (1897).

income. Here, too, Congress has made clear its intent that the tribes, not the states, appropriate whatever economic rent is available on the reservations to satisfy important federal objectives. Some harm to the Reservation must exist as a result of the state's taxes as a matter of common sense and economic reality, and, therefore, any findings of fact in this case that conflict with these economic realities must be overturned. *Ward v. Love County*, 253 U.S. 17 (1920); *Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927); *Cox v. Louisiana*, 379 U.S. 536, 545 (1965); Stern, Gressman, and Shapiro, *supra*, at 185-87.

C. New Mexico Cannot Show Sufficient Interests at Stake To Support Its Taxes in This Case.

New Mexico's taxes are imposed upon an activity involving reservation-generated value and are unsupported by the requisite showing that state interests justify such taxes. *See Washington v. Confederated Colville Tribes*, 447 U.S. 134, 157 (1980). New Mexico exercises few governmental responsibilities on the Reservation; in most instances, it lacks jurisdiction to do so. For example, the State lacks jurisdiction to regulate oil and gas development on Indian reservations. *See Assiniboine and Sioux Tribes v. Calvert Exploration Co.*, 223 F.Supp. 909 (D.Mont. 1963), *rev'd sub nom. Yoder v. Assiniboine and Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964); *Shoshone Indian Tribe and Arapahoe Indian Tribe v. Hathaway*, No. 5367 Civ. (D. Wyo. Nov. 7, 1969). In light of the foregoing, the only services the state legitimately can claim for purposes of supporting its interest in this case are those delivered to the reservation taxpayers.

Importantly, New Mexico has many non-reservation sources available to it to pay for the costs of services

to the reservation. For example, the state receives substantial federal funding for construction and operation of schools on the reservation. *See* Federal Impacted Areas Act, *supra*; School Facilities Construction Act, *supra*. In addition, since virtually no private economy exists on the Jicarilla Apache Reservation, Reservation residents must leave the Reservation to purchase goods and services, and they pay substantial state taxes on these purchases. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

The record shows the inequity that results if New Mexico's taxes are not held to be pre-empted. The value of services provided to Cotton by New Mexico was only $89,384.80, but $2,293,953.00 in taxes were collected from Cotton for the period 1981-85; in other words, only 3.8% of the oil and gas taxes collected from Cotton were returned by New Mexico in the form of services. Jurisdictional Statement at 6. Surely this gross disparity between state taxes and state services shows insufficient state interests to justify the taxes. New Mexico is enjoying a tremendous windfall profit that benefits primarily off-reservation citizens. New Mexico is appropriating reservation-generated value needed desperately by tribal citizens to help achieve the federal objectives of maximizing tribal royalty income and ensuring the strengthening of tribal government and reservation economic development. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. at 1092.

CONCLUSION

Amici curiae respectfully submit that the Motion To Dismiss should be granted on the grounds that a Commerce Clause claim and a federal pre-emption claim are not presented properly for review here and that, in any event, New Mexico's taxes do not conflict with the Interstate Commerce Clause. If, contrary to *amici's* submission, the Court reaches the merits of Indian Commerce Clause and federal pre-emption issues, it should hold New Mexico's taxes invalid.

Respectfully submitted,

By ______________________

CATHERINE BAKER STETSON*
SUSAN M. WILLIAMS
1225 Rio Grande Boulevard, N.W.
Albuquerque, New Mexico 87104-2630
(505) 842-6961

Counsel of Record